Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS L. CAREY, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by establishing a rule—in conflict with this Court's reasoning in *Carey v. Saffold*, 536 U.S. 214 (2002), and that of five other courts of appeal—that a state application for post-conviction review that is denied solely on the merits must be considered timely filed for purposes of determining whether the one-year statute of limitations for filing federal habeas petitions is tolled, despite the petitioner's delay of many months or years in filing the state application.

2. Whether this Court should certify questions to the California Supreme Court in order to provide guidance on the proper state-law predicate for this and future cases.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
THE STATUTE INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
Factual And Procedural Background	4
The Decision Below	6
REASONS FOR GRANTING THE PETITION	8
I. THE NINTH CIRCUIT'S INDEFINITE TOLLING RULE CONFLICTS WITH THIS COURT'S REASONING IN *CAREY v. SAFFOLD* AND WITH THE DECISIONS AND REASONING OF OTHER COURTS OF APPEALS	11
A. The Ninth Circuit's Decision Conflicts With This Court's Decision In *Carey v. Saffold*	11
B. Certiorari Should Be Granted To Resolve The Circuit Conflict Created By The Ninth Circuit	14

TABLE OF CONTENTS (continued)

		Page
II.	**GIVEN THAT FEDERAL COURTS IN THE NINTH CIRCUIT MUST MAKE AEDPA STATUTE OF LIMITATIONS TOLLING DECISIONS BASED UPON CALIFORNIA'S TIMELINESS RULES, THIS COURT MAY WISH TO CERTIFY QUESTIONS TO THE CALIFORNIA SUPREME COURT**	20
CONCLUSION		23
APPENDIX		
Appendix A Court of Appeals Opinion, 1/14/03		1a
Appendix B United States Supreme Court Opinion, 6/17/02		12a
Appendix C Court of Appeals Order, 7/8/02		40a
Appendix D Court of Appeals Order, 7/26/02		42a
Appendix E Court of Appeals Order, 1/22/03		44a
Appendix F United States Supreme Court Order, 10/15/01		45a
Appendix G Court of Appeals Opinion, 5/23/01		46a

TABLE OF CONTENTS (continued)

	Page
Appendix H Court of Appeals Opinion, 7/17/00	66a
Appendix I Court of Appeals Order, 6/4/01	83a
Appendix J District Court Order, 2/25/99	84a
Appendix K District Court Order, 1/6/99	86a
Appendix L Magistrate's Findings and Recommendations, 11/3/98	88a
Appendix M California Supreme Court Denial, 5/27/98	98a

TABLE OF AUTHORITIES

Page

Cases

Melancon v. Kaylo
259 F.3d 401 (5th Cir. 2001) 17, 18

Allen v. Mitchell
276 F.3d 183 (4th Cir. 2001) 14, 17, 18

Bennett v. Mueller
322 F.3d 573 (9th Cir. 2003) 9

Boscaino v. Roe
2003 WL 1473575 (9th Cir. 2003) 8

Carey v. Saffold
536 U.S. 214 (2002) i, 1, 3, 4, 6, 8, 9, 11-14, 18, 20-22

Fernandez v. Sternes
227 F.3d 977 (7th Cir. 2000) 15, 16, 18

Gibson v. Klinger
232 F.3d 799 (10th Cir. 2000) 16, 18

Hubley v. Superintendent
2003 WL 77260 (3rd Cir. 2003) 14

Hunter v. Aispuro
982 F.2d 344 (9th Cir. 1992) 9

In re Harris
5 Cal. 4th 813 (1993) 7, 11

TABLE OF AUTHORITIES (continued)

	Page
In re Harris 855 P.2d 391 (Cal. 1993)	6
Moore v. Crosby 321 F.3d 1377 (11th Cir. 2003)	18
Moran v. Clark 2003 WL 133092 (9th Cir. 2003)	8
Saffold v. Newland 250 F.3d 1087 (9th Cir. 2001)	5, 6, 16
Stewart v. Smith 534 U.S. 157 (2001)	21
Welch v. Newland 267 F.3d 1013 (9th Cir. 2001)	9, 10, 13
Wilson v. Hickman 2003 WL 264747 (9th Cir. 2003)	8
Young v. Terhune 2003 WL 136100 (9th Cir. 2003)	8

Statutes

28 United States Code	
§ 1254(1)	2
§ 2244(d)	2, 4
§ 2244(d)(1)	5
§ 2244(d)(2)	3, 5-7, 9, 13, 14, 16, 19-21

TABLE OF AUTHORITIES (continued)

	Page
28 United States Code § 2254	5

Court Rules

California Rules of Court rule 29.8	21

Other Authorities

Antiterrorism and Effective Death Penalty Act of 1996	4, 5, 13, 20, 21

IN THE SUPREME COURT OF THE UNITED STATES

No.

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v.

TONY EUGENE SAFFOLD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioner Thomas L. Carey (hereafter "the Warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App. A, 1a-11a) is reported at 312 F.3d 1031. An earlier opinion of this Court in this case (App. B, 12a-39a) is reported at 536 U.S. 214. The Ninth Circuit's July 8, 2002, order on remand (App. C, 40a-41a) is reported at 295 F.3d 1024. The Ninth Circuit's July 26, 2002, order recalling mandate and granting rehearing (App. D, 42a-43a) is reported at 295 F.3d 1380. The Ninth Circuit's January 22, 2003, order granting stay of mandate (App. E, 44a) is unreported. This Court's October 15, 2001, order granting

certiorari (App. F, 45a) is reported at 534 U.S. 971. The earlier Ninth Circuit opinion vacated by this Court (App. G, 46a-65a) is reported at 250 F.3d 1262. An earlier superseded Ninth Circuit opinion (App. H, 66a-82a) is reported at 224 F.3d 1087. The Ninth Circuit's June 4, 2001, order granting stay of mandate (App. I, 83a) is unreported. The district court's February 25, 1999, order granting a certificate of appealability limited to the issue of whether the "application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1)" (App J, 84a-85a) is unreported. The district court's January 6, 1999, order adopting the findings and recommendations of the magistrate judge and dismissing the application for writ of habeas corpus (App. K, 86a-87a) is unreported. The magistrate judge's November 3, 1998, findings and recommendations (App. L, 88a-97a) are unreported. The California Supreme Court's May 27, 1998, denial of the petition for writ of habeas corpus (App. M, 98a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 4, 2002. A timely petition for rehearing was denied on January 14, 2003. App. 4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE STATUTE INVOLVED IN THE CASE

28 U.S.C. §2244(d) sets forth the following one-year statute of limitations period and tolling provision for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the judgment of a state court:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a

person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

This case involves the important federal question of how federal courts should properly determine whether a state petition for writ of habeas corpus has been timely filed under state law in order to merit tolling within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2). In *Carey v. Saffold*, 536 U.S. 214, 122 S.Ct. 2134, 2137-2139, 2141 (2002), this Court held, among other things, that an untimely filed application for state post-conviction relief does not retroactively toll the

one-year limitations period for filing federal habeas corpus petitions set forth in 28 U.S.C. § 2244(d). The Court further recognized, however, that determining whether an application for state post-conviction relief has been timely filed might be difficult in a state such as California, where the timeliness standard for filing a state habeas corpus petition is not a specific number of days, but rather is based on "reasonableness."

On remand from this Court's decision in *Carey v. Saffold*, the Ninth Circuit devised a method of determining the timeliness of state habeas petitions that is inconsistent with this Court's reasoning in *Carey v. Saffold*, conflicts with the decisions of five other courts of appeal, and deems timely state habeas petitions that are manifestly untimely. Specifically, the Ninth Circuit held that any state habeas petition that is denied by a California court solely on the merits must be considered timely regardless of the prisoner's delays of many months or years. This Court should grant certiorari and reverse the Ninth Circuit or certify a question to the California Supreme Court so that it may clarify state law in this area.

A. Factual And Procedural Background

Respondent Tony Eugene Saffold was found guilty in California state court on April 3, 1990, of murder, assault with a deadly weapon, two counts of robbery, and findings of firearm use associated with the murder and robberies. His conviction became final on April 20, 1992.

Four years later, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which imposed a one-year statute of limitations for state prisoners seeking habeas relief in federal courts. For prisoners such as Saffold whose convictions became final before the AEDPA's passage, the one-year statute of limitations began to run on the effective date of the act, April 24, 1996. However, the statute contains a tolling provision which provides that "[t]he time

during which a properly filed application for State post-conviction or other collateral review ... is pending shall not be counted toward any period of limitation . . . ." 28 U.S.C. § 2244(d)(2).

Five years after his state court direct appeal became final, and seven days before the one-year AEDPA statute of limitations period expired, Saffold filed his first state habeas corpus petition in superior court (alleging ineffective assistance of counsel). Five days after the superior court denied his petition on the merits, Saffold filed the identical petition with the state appellate court by delivering the petition to prison authorities. Following a summary denial of the petition by the state appellate court, Saffold waited over four and a half months before he filed his ineffective assistance claim with the California Supreme Court, which denied the petition "on the merits and for lack of diligence" on May 27, 1998. App. 98a.

The district court gained jurisdiction of the case pursuant to 28 U.S.C. § 2254 on June 4, 1998, when Saffold filed his federal application for writ of habeas corpus. The district court found the application to be barred by AEDPA's statute of limitations, 28 U.S.C. § 2244(d)(1), and dismissed the case. The district court reasoned that Saffold was only entitled to tolling during the period his petitions were actively under consideration by the state courts. Consequently, the district court denied Saffold tolling for the five-day gap between the superior court's denial of his first petition and the filing of his next petition in the court of appeal and for the 4 ½-month gap between the denial by the court of appeal and the filing of his petition in the California Supreme Court.

In *Saffold v. Newland*, 250 F.3d 1087 (9th Cir. 2001) (App. 46a-65a), the Ninth Circuit reversed the district court and held that, when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness at least partially addresses the merits, the AEDPA statute of limitations period is tolled from the filing of the prisoner's state petition in the trial court until the California Supreme Court's denial of his habeas

petition, including gaps between the filing of his petitions.

In *Carey v. Saffold*, this Court held that a state application for post-conviction review is "pending"—and therefore tolls the one-year limitations period for filing federal habeas corpus petitions—during the period between a lower state court's denial of relief and the filing of *timely* application for relief with a higher state court. App. 18a-23a, 25a-26a (122 S.Ct. at 2137-2139, 2141) and App. 36a (122 S.Ct. at 2146 (Kennedy, J., dissenting)). The Court disagreed with the Ninth Circuit, however, that Saffold's habeas petition to the California Supreme Court was necessarily timely filed. The Court explained that there are many reasons why a state court might deny "on the merits" an untimely application. The words "on the merits" in the California Supreme Court's order, held the Court, "cannot by themselves indicate that the petition was timely." App. 26a (122 S.Ct. at 2141). The Court therefore vacated the judgment below and remanded the case so that the Ninth Circuit could determine whether Saffold's 4½-month delay was "unreasonable" under California law, thereby causing his application to be untimely filed under state law and no longer "pending" under 28 U.S.C. § 2244(d)(2).

On remand from this Court, the Ninth Circuit initially ordered the case remanded to the district court for further proceedings consistent with *Carey v. Saffold* to determine "whether Saffold filed his original habeas petition in the California Supreme Court 'within a reasonable time after [he] knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim.'" *Saffold v. Carey*, 295 F.3d 1024, quoting *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993). App. 40a-41a. However, the Ninth Circuit subsequently recalled the mandate and granted rehearing. App. 42a (295 F.3d 1380).

B. The Decision Below

Thereafter, in *Saffold v. Carey*, the Ninth Circuit once

again concluded that Saffold did not unreasonably delay in filing his petition after a 4½-month delay and that he was therefore entitled to tolling under 28 U.S.C. § 2244(d)(2) during that entire period. App. 11a. The court of appeals reached this conclusion by pointing to other California Supreme Court orders that summarily denied even tardier petitions (involving delays of 7 months, 9 months, 15 months and 18 months) without mentioning untimeliness.[1/] App. 9a.

The Ninth Circuit reasoned that, because the California Supreme Court did not mention timeliness in its orders denying those more tardy petitions, those petitions were deemed timely by the California Supreme Court. It therefore follows (held the Ninth Circuit) that the California Supreme Court's finding of "lack of diligence" in the order denying Saffold's petition must have referred to his 5-year delay before filing his initial petition in state trial court, not the 4½-month delay before filing his later petition. And because the California Supreme Court's order did not speak to the timeliness of the habeas petition Saffold filed with the California Supreme Court, that court must have deemed that petition to be timely. App. 9a-11a.

The Ninth Circuit did not purport to apply the standard for timeliness set out by the California Supreme Court in *In re Harris*, 5 Cal. 4th 813, 828 n.7, 855 P.2d 391, 398 n.7 (1993), under which a state habeas petition is timely if it is "filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." Nor did the Ninth Circuit suggest any reason why 4½ months was a "reasonable time" in a case where the petitioner had already filed two prior habeas petitions with state courts.

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1. Saffold presented this same "evidence" (specific orders by the California Supreme Court in other cases) to this Court as appendices to his Brief on the Merits, as documents lodged with this Court, and in argument before this Court. *See* 2002 WL 122615 (U.S. Resp. Brief) at 40, fn. 27, and Appendices A-E at 1a-24a; 2002 WL 371898 (U.S. Oral.Arg.) at 43-44.

REASONS FOR GRANTING THE PETITION

At issue here is the important federal question of how federal courts should determine whether a state habeas corpus petition has been timely filed under state law in order to merit tolling of the federal statute of limitations. On remand from this Court, the Ninth Circuit established an indefinite tolling rule that treats a California state court denial on the merits as conclusive evidence that a habeas corpus petition was timely filed under state law, even where the petitioner delayed many months or even years before filing the petition. This tolling rule is inconsistent with this Court's reasoning in *Carey v. Saffold* and conflicts with the opinions of the Fourth, Fifth, Seventh, Tenth and Eleventh Circuits.

Furthermore, the Ninth Circuit's decision undermines Congress's intent to expedite the federal habeas process. In the short time since the court of appeals issued its decision, other panels of the Ninth Circuit have vacated numerous district court decisions that had found delays of more than, or almost, an entire year to be untimely. *See, e.g., Boscaino v. Roe*, 2003 WL 1473575 (9th Cir. 2003) (unreported) (vacating district court's decision that petitioner was not entitled to tolling for the 13-month period between the superior court's denial of his habeas petition and the filing of another habeas petition in the state court of appeal); *Young v. Terhune*, 2003 WL 136100 (9th Cir. 2003) (unreported) (13-month delay); *Moran v. Clark*, 2003 WL 133092 (9th Cir. 2003) (unreported) (10½-month delay); *Wilson v. Hickman*, 2003 WL 264747 (9th Cir. 2003) (unreported) (8-month delay).

Under the Ninth Circuit's opinion, federal district courts in California must now grant statutory tolling even in cases of multiple substantial delays, so long as the state court issued a summary denial on the merits, which is a common practice in

California.[2/] For example, the Warden recently was ordered to file an answer following the January 30, 2003, denial of the State's motion to dismiss the federal petition as time barred in a case involving a cumulative delay of over 35 months. The delay consisted of an unexplained delay of over 18 months between the denial of the prisoner's first state petition by the superior court and the filing of his petition with the state court of appeal; an additional unexplained delay of over 4 months between the denial by the superior court of the prisoner's successive state petition and the filing of his second state petition with the court of appeal; and yet another unexplained delay of over 13 months between the denial of his second court of appeal petition and the filing of his second petition with the California Supreme Court. *Cruz v. Castro*, E.D.Cal. No. CIV S-1-1675 LKK JFM P.

Resolution of this case will ensure that the thousands of federal habeas petitions filed in California each year will be subject to the nationally binding tolling rule established by this Court's interpretation of 28 U.S.C. § 2244(d)(2) in *Carey v. Saffold* and will prevent the Ninth Circuit from unfairly granting statutory tolling in California cases "when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." App. 26a (*Carey v. Saffold*, 122 S.Ct. at 2141 citing *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001) (finding limitations period tolled during 4-year gap)).

This Court also should consider certifying questions to the California Supreme Court to provide guidance on the proper state-law predicate for this and future cases. Although the Ninth Circuit recently concluded in *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003) that a 6-year delay qualifies as substantial delay under California law, it has not determined "the minimum

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2. The California courts of appeal and the California Supreme Court commonly issue orders denying habeas petitions with just one word, "denied." The Ninth Circuit has interpreted such one-word orders to be on the merits. *Hunter v. Aispuro*, 982 F.2d 344, 347-348 (9th Cir. 1992).

amount of time that constitutes substantial delay" under California law. *Id.* at 579-580. In the instant case, the Ninth Circuit declined to determine the minimum amount of time that constitutes substantial delay and chose instead to adopt a rule that grants tolling for unexplained delays of many months or years. Given the Ninth Circuit's explicit reference in the present case to summary denials on the merits in cases involving gaps as long as 18 months and given the Ninth Circuit's willingness in *Welch* to grant tolling for a gap of over 4 years in a case involving an identical summary denial on the merits, it would be appropriate to receive a definitive answer from the California Supreme Court regarding the point at which delays in filing habeas petitions become unreasonable, thereby making the petitions untimely.

I.

THE NINTH CIRCUIT'S INDEFINITE TOLLING RULE CONFLICTS WITH THIS COURT'S REASONING IN *CAREY v. SAFFOLD* AND WITH THE DECISIONS AND REASONING OF OTHER COURTS OF APPEALS

A. The Ninth Circuit's Decision Conflicts With This Court's Decision In *Carey v. Saffold*

In *Carey v. Saffold*, this Court held the Ninth Circuit erred in concluding that the California Supreme Court found Saffold's habeas petition to be timely because it denied that petition not only "for lack of diligence," but also "on the merits." App. 25a-26a (122 S.Ct. at 2141). The Court pointed out that there are many reasons why a state court might deny a habeas petition on the merits, even though the petition was untimely. "Given the variety of reasons why the California Supreme Court may have included the words 'on the merits,' those words cannot by themselves indicate that the petition was timely." *Id.* The Ninth Circuit's decision following remand disregards that reasoning and essentially repeats its earlier error.

This Court remanded the case back to the Ninth Circuit to determine whether the habeas petition Saffold filed with the California Supreme Court after a 4½-month delay was untimely. The answer was not self-evident because, whereas "[o]ther States . . . specify precise time limits, such as 30 or 45 days, within which an appeal must be taken," App. 22a (122 S.Ct. at 2139), under California law the question is "whether the prisoner exercised 'due diligence' in filing his petition within a reasonable time after he becomes aware of the grounds for relief." App. 36a (122 S.Ct. at 2146 (Kennedy, J., dissenting) (quoting *In re Harris*, 5 Cal.4th at 828, n.7)).

On remand, the Ninth Circuit once again concluded that

the California Supreme Court's denial of that petition "on the merits" conclusively showed that it was timely. The court of appeals did acknowledge, unlike the first time it heard the case, that the reference to "for lack of diligence" might have been relevant to the tolling inquiry. But the court went on to conclude that the words "for lack of diligence" referred to Saffold's 5-year delay before filing his first state habeas petition. For the Ninth Circuit that ended the inquiry.

But even assuming *arguendo* that the California Supreme Court was referring to the earlier 5-year delay when it used the words "for lack of diligence," that does not resolve the question whether Saffold's petition to the California Supreme Court — filed after a 4½ -month delay — was timely or not. As far as the Ninth Circuit is concerned, the California Supreme Court's order did not address the issue of whether the petition to the California Supreme Court was timely. However, as this Court made clear in *Carey v. Saffold*, the mere fact that a state court addresses the merits of a petition (either with or without a specific finding of untimeliness) does not mean that the state petition was timely filed under state law or federal law. App. 25a-26a (122 S.Ct. at 2141).

This Court pointed out that, among the instances a state court will address the merits of an untimely claim is "where the merits present no difficult issue." *Id.* The Court added that:

> the Ninth Circuit's apparent willingness to take such words [as "on the merits"] as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. *See, e.g., Welch v. Newland*, 267 F.3d 1013 (CA9 2001) (finding limitations period tolled during 4-year gap). The Ninth Circuit's rule consequently threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.

App. 26a (122 S.Ct. at 2141).

That very fear has proven true. The Ninth Circuit's reasoning means that the state habeas petitions denied solely "on the merits" that it pointed to in its opinion — which involved delays of 7 months, 9 months, 15 months, and 18 months — were all timely. As noted, subsequent opinions by Ninth Circuit panels and district courts in California have followed that course.

Indeed, the California Supreme Court order considered in *Welch v. Newland*, *supra*, was a summary denial identical to those in the cases relied upon by the Ninth Circuit in its most recent opinion. Under the Ninth Circuit rule created in the decision below, *Welch v. Newland* was correctly decided, and the application filed by Welch after a 4-year delay was timely. This confirms an "apparent willingness" by the Ninth Circuit "to take such words as an absolute bellwether" thereby risking "the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." App. 26a (122 S.Ct. at 2141).

The fact that a state court might have explicitly imposed an untimeliness bar for a 5-year delay in filing a first state petition does not relieve the federal court from determining whether or not an additional delay of 4 months, 7 months, 9 months, 15 months, 18 months, or 4 years before filing a subsequent petition with a higher state court constitutes substantial delay under state law. This determination must be made in order to grant tolling under 28 U.S.C. § 2244(d)(2) because only timely filed petitions merit such tolling. App. 18a-23a, 25a-26a (122 S.Ct. at 2137-2139, 2141) and App. 36a (122 S.Ct. at 2146 (Kennedy, J., dissenting)).

The reasoning of this Court in *Carey v. Saffold* mandates that federal courts not rely on summary denials by the California Supreme Court in order to resolve underlying motions to dismiss for failure to comply with AEDPA's statute of limitations. Instead, federal courts must apply California's

timeliness standards to the facts of the particular case to determine whether or not a prisoner has timely filed his or her California Supreme Court petition, which he or she must do to qualify for tolling under 28 U.S.C. § 2244(d)(2). As recently explained by the Third Circuit, this Court in *Carey v. Saffold*:

> [N]oted that the AEDPA statute of limitations would not automatically be tolled for whatever "reasonable" period California law allowed to appeal a post-conviction review. Rather, Saffold was required to actually seek that review, and to do so within that reasonable period, in order for the 2244 one year statute of limitations to toll.

Hubley v. Superintendent, 2003 WL 77260 (3rd Cir. 2003) (unreported).

Due to the conflict between the Ninth Circuit and this Court's opinion in *Carey v. Saffold*, this Court should grant certiorari and reverse the Ninth Circuit's indefinite tolling rule.

B. Certiorari Should Be Granted To Resolve The Circuit Conflict Created By The Ninth Circuit

By establishing an indefinite tolling rule that treats California state court denials on the merits as conclusive evidence that habeas corpus petitions were timely filed under state law despite substantial delay of many months or even years, the Ninth Circuit has created a direct conflict with the Fourth Circuit, and a conflict in principle with four other circuits, the Fifth, Seventh, Tenth and Eleventh Circuits.

In *Allen v. Mitchell*, 276 F.3d 183 (4th Cir. 2001), the Fourth Circuit confronted the same difficulty that the Ninth Circuit faced here. As in California, there is an "absence of a fixed appellate deadline under North Carolina law." *Allen*, 276

F.3d at 186. Under North Carolina law, a non-capital prisoner whose motion for appropriate relief has been denied by the superior court may seek review by filing a petition for certiorari in the North Carolina Court of Appeals, and such a "petition must be filed 'without unreasonable delay.' (N.C. R.App. P. 21(c)." *Id.* And, as with Saffold, the North Carolina Court of Appeals rejected Allen's state habeas petition through a summary order that did not speak to whether it was timely filed. In direct conflict with the Ninth Circuit, the Fourth Circuit did not interpret the state court order as implicitly holding that the state petition was timely.

The *Allen* court explained that, although Allen's petition had not been dismissed as untimely by the state court, it did not follow that there was no "unreasonable delay" under the North Carolina statute. This is because "the court of appeals may simply have opted to 'excuse[] the untimeliness as a matter of state law and rule[ ] on the merits.'" *Id.* at 186-187 (quoting *Fernandez v. Sternes*, 227 F.3d 977, 981 (7th Cir. 2000)). Consequently, the *Allen* court remanded the case for further proceedings to determine whether Allen's certiorari petition was timely under the state's "without unreasonable delay" standard that required a determination of whether or not the petition would be subject to dismissal under the equitable doctrine of laches. *Id.*

The Ninth Circuit's decision is also irreconcilable with the decisions of four other courts of appeal that have addressed the related issue of how to treat (for tolling purposes) state post-conviction applications that are undeniably untimely, but which the state courts nevertheless elect to review on the merits. Four of the five courts of appeals to address the issue have concluded that the federal limitations period is not tolled during the time period between the expiration of the deadline for filing the state application and the date on which the state court agrees to review the untimely application. These decisions confirm the basic principle that eluded the Ninth Circuit in its decision on remand: that there is nothing inconsistent with a state court's

decision to rule on a habeas application on its merits and that application still being untimely under state law such that it does not toll the federal one-year limitations period.

For example, in *Fernandez v. Sternes*, 227 F.3d at 981, the Seventh Circuit severely criticized the Ninth Circuit's indefinite tolling rule set forth in *Saffold v. Newland*, 224 F.3d 1087, stating that it preferred "reality" over the Ninth Circuit's "make-believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing." The Seventh Circuit explained that:

> It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim.

Fernandez v. Sternes, 227 F.3d at 980-981. The *Fernandez* court's critique of the Ninth Circuit's first indefinite tolling rule is equally applicable to the indefinite tolling rule established in the instant case. The Ninth Circuit's current practice of granting tolling under 28 U.S.C. § 2244(d)(2) for delays of many months or years "as long as the state court denied the belated request on the merits" continues to be in the words of the Seventh Circuit, an "implausible understanding of § 2244(d)(2)" that will "sap the federal statute of limitations of much of its effect." *Id.* at 980.

Likewise, in *Gibson v. Klinger*, 232 F.3d 799 (10th Cir. 2000), the Tenth Circuit held that a "state court's grant of leave to appeal out of time cannot erase the time period during which nothing was pending before a state court" *id.* at 804, and emphasized that "a state court's decision to reach the merits of

a case does not transform all of a petitioner's post-conviction motions into one 'properly filed' application." *Id.* at 805. The court further stressed that "[a] state court's decision to look beyond procedural deficiencies or to grant an appeal out of time does not transform all of a petitioner's state filings into one 'properly filed' application, which essentially 'relates back' to a petitioner's original application for state post-conviction relief." *Id.* at 806. The *Gibson* court concluded that its "definition of 'pending' is most consistent with Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Id.* at 807.

In *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001), the Fifth Circuit stated that its prior holding "that a case was no longer pending when further appellate review was unavailable" applied "equally to situations in which a state court did consider the merits of an untimely application." The *Melancon* court explained that:

> A state court's subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application. Thus, after the appeal period has lapsed, an application ceases to be pending but a subsequent properly filed application entitles the petitioner to additional tolling beginning at the time of the "proper" filing.

Id. The Fifth Circuit stressed that "[t]his finding is consistent with Congress's intent to encourage exhaustion of state remedies without allowing petitioners to indefinitely toll the limitations period." *Id.* *Accord*, *Allen v. Mitchell*, 276 F.3d at 184-186 ("the statute of limitations is not tolled between the expiration of a state appeal deadline and the subsequent filing of an untimely appellate petition" because a contrary approach such as that taken by the Ninth Circuit "would undermine the

statute of limitations by allowing state courts to extend indefinitely the time for seeking federal review").

Following this Court's decision in *Carey v. Saffold*, the Eleventh Circuit has become the latest circuit court to adopt the reasoning of the majority view set forth by *Melancon*, *Gibson*, *Fernandez* and *Allen*. In *Moore v. Crosby*, 321 F.3d 1377 (11th Cir. 2003), the Eleventh Circuit addressed the question of "what effect the granting of a motion for belated appeal from the denial of a timely state application would have on calculating how long that state application was pending under section 2244(d)(2)." *Id.* at 1380. After adopting the reasoning of the Fifth Circuit's *Melancon* opinion, the *Moore* court held "that the petitioner's belated appeal motion was not pending during the limitations period" because such an application "does not relate back so as to toll idle periods . . . ."[3] *Id.* at 1381.

Just as prisoners who fail to timely file their state habeas petitions in states with precise time limits will fail to qualify for retroactive tolling even though their state courts choose to decide their claims on the merits, prisoners in California who fail to timely file their state petitions by engaging in substantial delay under California law will fail to qualify for tolling under *Carey v. Saffold* even though the state supreme court chooses to address their claims on the merits. The critical issue is not whether a California court fails to impose a procedural bar for "lack of diligence" and instead issues a summary denial on the

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3. It should be noted that the Sixth Circuit recently found a Michigan prisoner's federal habeas petition to be timely filed under 28 U.S.C. § 2244(d)(1) despite the prisoner's delayed application for leave to appeal. *Mack v. Holt*, 2003 WL 1519266 (6th Cir. 2003) (unreported) (per curiam). In so holding, the *Holt* court relied on this Court's definition of "pending" set forth in *Carey v. Saffold*, 122 S.Ct. at 2138, and also noted that the prisoner's "delayed petition for leave to appeal was denied by the Michigan Court of Appeals on the merits and not because of the delay." *Id.* at *1, n.1. Although the *Holt* decision is consistent with the Ninth Circuit's opinion, *Holt* offers little analysis and fails to address this Court's holding in *Carey v. Saffold* that only timely filed petitions cause state applications to be retroactively pending under 28 U.S.C. § 2244(d)(2).

merits. Rather, the critical issue is whether the prisoner has timely filed his state petition under California law, thereby qualifying for tolling under 28 U.S.C. § 2244(d)(2) and *Carey v. Saffold*. The Ninth Circuit's approach to this issue is contrary to the approach followed in the Fourth, Fifth, Seventh, Tenth and Eleventh Circuits. Certiorari should be granted to resolve the circuit conflict.

II.

GIVEN THAT FEDERAL COURTS IN THE NINTH CIRCUIT MUST MAKE AEDPA STATUTE OF LIMITATIONS TOLLING DECISIONS BASED UPON CALIFORNIA'S TIMELINESS RULES, THIS COURT MAY WISH TO CERTIFY QUESTIONS TO THE CALIFORNIA SUPREME COURT

Recognizing the difficulty presented by the intersection between AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), and California's timeliness rules, this Court in *Carey v. Saffold* suggested that the Ninth Circuit might consider "whether it would be appropriate to certify a question to the California Supreme Court for the purpose of seeking clarification in this area of state law." App. 26a-27a (122 S.Ct. at 2141). Although the Warden believes that Saffold's 4 ½-month delay was patently unreasonable under California law and that Saffold failed to meet his burden under California law to explain the delay, this Court may wish to consider certifying questions of law to the California Supreme Court in light of the Ninth Circuit's refusal of the Warden's request to do so[4] and because

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4. The Warden suggested to the Ninth Circuit that the questions certified might be framed as follows:

> In light of the United States Supreme Court opinion in *Carey v. Saffold*, 122 S.Ct. 2134 (2002), we wish to certify the following questions to the California Supreme Court:
>
> In making the limited determination of whether or not a state habeas petition has been **timely filed** in the California Supreme Court following the denial of the same petition by a lower state court (as distinguished from the separate question of whether or not the California Supreme Court would impose a procedural bar for untimeliness), would the California Supreme Court find

the answer to such certified questions could provide guidance for this case as well as future cases. *See Stewart v. Smith*, 534 U.S. 157 (2001) [certifying question to the Arizona Supreme Court to help determine the proper state-law predicate for determination of the federal constitutional questions raised in a capital federal habeas case].

The AEDPA tolling issue presented in this case poses a novel question of law that is appropriate for certification to the California Supreme Court. This is so because this Court in *Carey v. Saffold* decided that California's system of original habeas corpus petitions operates as the "functional equivalent" of an appellate process for purposes of determining tolling under AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2). However, the California Supreme Court has never before had any reason to specifically address the narrow issue raised by the Ninth Circuit's *Saffold* line of cases and this Court's decision in *Carey v. Saffold*, nor is it likely to have occasion to address the issue absent a request from this Court or the Ninth Circuit because of California's system of original jurisdiction for habeas corpus. Certification of questions to the California Supreme Court pursuant to California Rules of Court, rule 29.8 would enable the California Supreme Court to provide clarification as to whether or not it would in fact hold that habeas petitions on "appeal" to a higher court must be filed within 60 days (the time specified in the California Rules of Court for filing a notice of appeal in civil and criminal appellate

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such a petition to be **untimely filed** under state law if it was filed more than 60 days following the denial of the same petition by the lower court? If not, how would the California Supreme Court apply state law to determine at what point such a subsequent petition would be considered untimely filed (regardless of whether or not the California Supreme Court might eventually decide to reach the merits of the claim and regardless of whether or not the California Supreme Court might decide to impose a procedural bar for untimeliness)?

cases) or some other time frame in order to be timely filed. Furthermore, if the California Supreme Court accepts certification of questions on the instant tolling issue, the answers would be applicable to all summary habeas denials. In short, certification could provide federal courts with clear guidance on California law pertaining to the unique intersection between state and federal law and would minimize the "substantial uncertainty, and resulting federal litigation, over whether a prisoner had filed his habeas petition within a reasonable time." App. 37a (122 S.Ct. at 2146 (Kennedy, J., dissenting)).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Dated: April 10, 2003

Respectfully submitted,

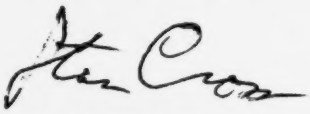
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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD, **Petitioner-Appellant,**	)	No. 99-15541
v.	)	D.C. No. CV-98-01040-DFL
THOMAS L. CAREY, **Respondent-Appellee.**	)	**ORDER AND AMENDED OPINION**

On Remand from the United States Supreme Court

Filed December 4, 2002
Amended January 14, 2003

Before: Betty B. Fletcher, William C. Canby, and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district

court. The court held that an order issued by the California Supreme Court denying a habeas petitioner's petition in part for "lack of diligence" does not mean that the petition before that court was untimely when the petitioner presents evidence of contemporaneous orders issued by the California Supreme Court denying other petitions on the merits, even though those petitions were filed later than that of the petitioner.

A California state court found appellant Tony Saffold guilty of murder, amongst other things. Saffold's conviction was affirmed on direct review and became final in 1992. Because Saffold's conviction became final before the Antiterrorism and Effective Death Penalty Act's (AEDPA) passage, AEDPA's one-year statute of limitations began to run on the effective date of that act. The statute contained a tolling provision stating that the time during which a properly filed application for state post-conviction or other collateral review would not be counted toward the limitation period. Saffold filed his state habeas petition in the California state court one week before the federal deadline. Five days after the petition was denied, Saffold filed a petition in the state court of appeal. That petition also was denied. Saffold then waited four and one-half months before filing a final state petition with the California Supreme Court. In rejecting Saffold's petition, the California Supreme Court stated that it had denied the petition "on the merits and for lack of diligence." One week later, Saffold petitioned for habeas relief in federal district court. The district court rejected Saffold's petition, finding that the tolling period was not long enough to make the petition timely because the limitation period was not tolled during the intervals between each state court's rejection of his petition and Saffold's subsequent re-filing of the petition in a higher court.

Saffold appealed, and the court of appeals reversed. The

entire time Saffold's petition was being processed in the state courts was tolled for the purposes of AEDPA's one-year statute of limitations, making Saffold's federal petition timely. Further, the court of appeals determined that Saffold's state petition to the California Supreme Court was timely, as the language used by the California Supreme Court — "lack of diligence and on the merits" — indicated that the court applied its untimeliness bar only after considering the underlying federal constitutional questions raised. The United States Supreme Court granted certiorari and remanded, determining that while Saffold's petition was pending until the California Supreme Court denied it, the words "on the merits" could not be themselves indicate that the petition was timely. On remand, Saffold presented five orders issued by the California Supreme Court at and around the same time it issued its order denying his petition. The orders were almost identical to Saffold's except that they involved petitions filed in the California Supreme Court more than four-and-a-half months after being rejected by the federal court of appeals. Because none of those orders contained the words "for lack of diligence," Saffold argued that the denials were made solely on the merits, despite the fact that the delay between the court of appeals' denial of the writ and the re-filing before the state supreme court was longer than Saffold's four and one-half month delay.

[1] The contemporaneous orders demonstrated that the California Supreme Court's finding of "lack of diligence" did not apply to Saffold's four and one-half month delay. **[2]** The Supreme Court's determination that Saffold's petition was pending until the California Supreme Court's determination that Saffold's petition was pending until the California Supreme Court denied it, when viewed in light of the California Supreme Court's orders denying on the merits petitions that were far more tardy than Saffold's, compelled the conclusion that

Saffold's petition was not denied as untimely by the California Supreme Court, and that he was entitled to tolling for the four and one-half month period. [3] Thus, the judgment of the district court had to be reversed.

ORDER

The opinion filed December 4, 2002, is hereby ordered amended as follows:

> Slip Op. at page 8, lines 1-3: Delete the following language: "— evidence that was not presented either to this court or to the United States Supreme Court —".

Except as herein modified, the panel has voted unanimously to deny the Petition for Rehearing.

The Petition for Rehearing is therefore DENIED.

OPINION

O'SCANNLAIN, Circuit Judge:

The Supreme Court having vacated the opinion of this court in *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001), and remanded, we must decide whether the California Supreme Court's order denying Appellant's habeas corpus petition both "on the merits and for lack of diligence" means that his petition before that court was untimely and therefore ineligible for tolling with respect to the one-year statute of limitations for

state prisoners seeking habeas relief in federal court.

I

In 1990, a California state court found Tony Eugene Saffold guilty of murder, assault with a firearm, and two counts of robbery. Saffold's conviction was affirmed on direct review and became final on April 20, 1992.

Four years and four days later, Congress passed the Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104 132, 110 Stat. 1214 ("AEDPA"), which imposed a one-year statute of limitations for state prisoners seeking habeas relief in federal courts. For prisoners whose convictions became final before the AEDPA's passage--as Saffold's did--the one-year statute of limitations began to run on the effective date of the act, April 24, 1996. The statute, however, contains a tolling provision: "The time during which a properly filed application for State post-conviction or other collateral review ... is pending shall not be counted toward any period of limitation. "28 U.S.C. § 2244(d)(2).

Saffold filed his state habeas petition in the state trial court one week before the federal deadline. That petition was denied. Five days later, Saffold filed a petition in the state court of appeal. That petition also was denied. Saffold then waited four and one-half months before filing his final state petition with the California Supreme Court. Once again, Saffold's petition was rejected in a one-sentence order in which the California Supreme Court stated that it had denied the petition "on the merits and for lack of diligence."

Approximately one week later, Saffold petitioned for habeas relief in federal district court. The district court, in

rejecting Saffold's petition, held that the one-year statute of limitations was tolled only for that period of time during which the state courts were *actively* considering his petition — a period that did not include the intervals between each state court's rejection of his petition and Saffold's subsequent re-filing of the petition in a higher court. Subtracting the intervals between Saffold's successive petitions in the California state courts — most notably the four and one-half month delay between the court of appeal's ruling and his application to the California Supreme Court — the district court found that the tolling period was not long enough to make his petition timely. Accordingly, it dismissed Saffold's petition.

This court reversed the district court and held that the entire time Saffold's petition was being processed in the state courts — including the intervals between the rejection of the petition by one state court and Saffold's refiling with the higher state court — was tolled for the purposes of AEDPA's one-year statute of limitations. *See Saffold*, 250 F.3d at 1266-67. We further held that Saffold's petition to the California Supreme Court was timely despite the fact that he had waited four and one-half months after the court of appeal denied his petition before re-filing with the state's highest court. We justified the latter holding by noting that the California Supreme Court had denied Saffold's petition for "lack of diligence and on the merits," language indicating that the court had "applied its untimeliness bar only after considering to some degree the underlying federal constitutional questions raised." *Saffold*, 250 F.3d at 1267.

The United States Supreme Court granted certiorari and considered three questions:

"(1) Does [the] word ['pending'] cover the time

between a lower state court's decision and the filing of a notice of appeal to a higher state court?

(2) If so, does it apply similarly to California's unique state collateral review system — a system that does not involve a notice of appeal, but rather the filing (within a reasonable time) of a further original state habeas petition in a higher court?

(3) If so, was the petition at issue here . . . pending during that period, or was it no longer pending because it failed to comply with state timeliness rules?"

Carey v. Saffold, 122 S.Ct. 2134, 2136 (2002). The Court answered the first two questions affirmatively but nevertheless held that our reliance on the California Supreme Court's use of the words "on the merits" as conclusive proof that Saffold's petition was not untimely was misplaced. Finding that "the words 'on the merits' . . . cannot by themselves indicate that the petition was timely," *id.* at 2141, the Court remanded the case to this court for further consideration of the third question.

II

Because the Supreme Court has held that AEDPA's limitations period for federal habeas review is tolled for the *entire* time that a habeas petition is "pending" in state court, *see Carey*, 122 S.Ct. 2134, 2136- 37 (2002), the central question in this case is now quite a narrow one, namely the meaning of the California Supreme Court's minute order denying Saffold's petition both "on the merits" and "for lack of diligence." More

specifically, the issue is whether the California Supreme Court's use of the phrase "lack of diligence" means that Saffold's original habeas petition before that court was untimely. If that is what the order means, then Saffold's four and one-half month delay is not tolled and he is barred from petitioning for habeas relief in federal court. If, on the other hand, the California Supreme Court's "lack of diligence" language was meant to indicate some other failure by Saffold in the pursuit of habeas relief — such as his initial five-year delay in seeking post-conviction relief in state court — then his petition was timely filed and therefore "pending" for the purposes of AEDPA's tolling provision.

A

In support of its position, the State notes that the Supreme Court concluded that California's habeas review procedures — despite requiring inmates to file an original petition at every level — are the "functional equivalent" of a more conventional direct appeal process. *See Carey*, 122 S.Ct. at 2140. Given this functional equivalence between California's procedure for habeas review of criminal convictions and its more conventional procedure for direct review of criminal convictions, the state argues that this court should look to the California Rules of Court governing direct review to determine what constitutes an "unreasonable delay" in filing a habeas petition in a higher state court after the lower court has rejected the petition. Those rules require defendants to file notice of their direct appeal within 60 days after the mailing of the notice of the entry of judgment against them. Cal. R. of Court 2 and 31. Thus, the state argues, because collateral review of Saffold's conviction is functionally equivalent to direct review thereof, the time within which he is required to seek review from a higher court should likewise be the same for both forms of

review. And because Saffold waited four and one-half months — clearly longer than 60 days — his delay was unreasonable, his petition time-barred, and Saffold himself ineligible for tolling.

B

The State's argument is not without some surface appeal. Saffold, however, contends that this court need not engage in a legal analysis of what constitutes unreasonable delay under California law. He further argues that there need be no remand for any further factual determinations regarding the precise timing of his petition. This is so, according to Saffold, because there is solid proof that the term "lack of diligence" in the California Supreme Court's order refers to Saffold's five-year delay in filing his *initial* petition for post-conviction relief in state court, not his four and one-half month delay in filing his petition before the California Supreme Court. The proof comes in the form of five orders issued by the California Supreme Court at and around the same time it issued its order denying Saffold's petition (Saffold's petition was denied on May 27, 1998).

These orders are almost identical to Saffold's save for two critical differences. First, they involved inmates who had filed their petitions to the California Supreme Court *more* than four-and-a-half months after the court of appeals rejected their petitions. *See In re Sampson*, No. S066428 (Cal. May 27, 1998) (nine-month delay); *In re Davis*, No. S067677 (Cal. May 27, 1998) (18 month delay); *In re Villegas*, No. S065899 (Cal. May 20, 1998) (seven- month delay); *see also Romero v. Roe*, 130 F.Supp.2d 1148, 1149 (C.D.Cal.2001) (15 month delay). Second, and more important, none of these orders of the California Supreme Court contains the words "for lack of diligence," which is to say they are denials made solely on the

merits — even despite the fact that the delay between the court of appeals' denial of the writ and the filing of the petition before the state supreme court was *longer* than the Saffold's four and one-half month delay.

III

[1] It is very difficult to read these minute orders alongside the California Supreme Court's order in this case and conclude that the its use of the term "lack of diligence" applies to Saffold's delay in filing his petition with that court. Rather, these contemporaneous court orders demonstrate that the court's finding of "lack of diligence" applies instead to Saffold's five-year delay in *initially* filing his habeas petition in state court. And while Saffold concedes that his five-year delay was clearly problematic under California precedent, that delay is irrelevant to the analysis of whether his application was pending for the purposes of tolling under AEDPA because California's timeliness rule is not a "condition to filing." *See Artuz v. Bennett*, 531 U.S. 4, 11 (2000) (holding that state procedural bars are not "conditions to filing" but rather "condition[s] to obtaining relief" and therefore do not render an application improperly filed); *see also Smith v. Duncan*, 297 F.3d 809, 812 (9th Cir. 2002) (holding that California's untimeliness bar is not a condition to filing where a petition was accepted for filing); *and Saffold v. Newland*, 250 F.3d 1262, 1269 n.1 (9th Cir. 2001) (O'Scannlain, J., dissenting) ("The fact that the procedural bar was not with regard to a 'condition to filing' simply means that Saffold's petition was 'properly filed' under" AEDPA.).

[2] The Supreme Court held that Saffold's petition was pending until the California Supreme Court denied it — provided he did not unreasonably delay in filing his petition. This holding, when viewed in light of the California Supreme

Court's orders denying on the merits petitions that were far more tardy than Saffold's, compels the conclusion that Saffold's petition was not denied as untimely by the California Supreme Court, that he is entitled to tolling for the four and one-half month period in question, and that his federal habeas petition should be reviewed on the merits by the district court.[1/]

[3] We therefore remand this case to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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1. We take pains to note that we have not been asked to provide any bright-line rule for determining what constitutes "unreasonable" delay under California's indeterminate timeliness standard. While such a bright-line rule would certainly be welcomed, it is ultimately irrelevant to the determination of this case. In any event, such an issue is more appropriately decided by the California Supreme Court or the California State Legislature.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

CAREY, WARDEN *v.* SAFFOLD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-301. Argued February 27, 2002—Decided June 17, 2002

The Antiterrorism and Effective Death Penalty Act of 1996 requires a state prisoner seeking federal habeas relief to file his petition within one year after his state conviction becomes final, 28 U.S.C. § 2244(d)(1)(A), but excludes from that period the time during which an application for state collateral review is "pending," § 2244(d)(2). Respondent Saffold filed a state habeas petition in California seven days before the federal deadline. Five days after the state trial court denied his petition, he filed a further petition in the State Court of Appeal. Four and one-half months after that petition was denied, he filed a further petition in the State Supreme Court, which denied the petition on the merits and for lack of diligence. The Federal District Court dismissed his subsequent federal habeas petition as untimely, finding that the federal statute of limitations was not tolled during the intervals between the denial of one state petition and the filing of the next because no application was "pending" during that time. In reversing, the Ninth Circuit included the intervals in the "pending" period, and found that Saffold's petition was timely because the State Supreme Court based its decision not only on lack of diligence but also on the merits.

Held:

1. As used in § 2244(d)(2), "pending" covers the time between a lower state court's decision and the filing of a notice of appeal to a higher state court. Most States' collateral review systems require a prisoner to file a petition in a trial court; then to file a notice of appeal within a specified time after entry of the trial court's unfavorable judgment; and, if still unsuccessful, to file a further notice of appeal (or request for discretionary review) to the state supreme court within a specified time. Petitioner warden seeks a uniform national rule that a state petition is not "pending" during the interval between a lower court's entry of judgment and the timely filing of a notice of appeal in the next court, reasoning that the petition is not being considered during that time. Such a reading is not consistent with the ordinary meaning of "pending," which, in the present context, means until the completion of the collateral review process; *i.e.*, until the application has achieved final resolution through the State's postconviction proceedings. Petitioner's reading would also produce a serious statutory anomaly. Because a federal habeas petitioner has not exhausted his state remedies as long as he has "the right under [state] law . . . to raise" in that State, "by any available procedure, the question presented, "§ 2254(c), and because petitioner's interpretation encourages state prisoners to file their petitions before the State completes a full round of collateral review, federal courts would have to contend with petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense required by law (because they would otherwise be barred by the 1-year imitations period). Pp. 3-5.

2. The same "pending" rule applies to California's unique collateral review system, even though that system involves, not a notice of appeal, but the filing (within a

"reasonable" time) of a further original state habeas petition in a higher court. California's system is not as special in practice as its terminology might suggest. A prisoner typically will seek habeas review in a lower court and later seek appellate review in a higher court. Thus, the system functions very much like that in other States, but for its indeterminate timeliness rule. That rule may make it more difficult for federal courts to determine when a review application comes too late. But the tolling provision seeks to protect the State's interests, and the State can explicate timing requirements more precisely should that prove necessary. In applying a federal statute that interacts with state procedural rules, this Court looks to how a state procedure functions, not its particular name. California's system functions in ways sufficiently like other state collateral review systems to bring intervals between a lower court decision and a filing in a higher court within the scope of "pending." Pp. 6-10.

3. The words "on the merits" by themselves do not indicate that Saffold's petition was timely, but it is not possible to conclude that the Ninth Circuit was wrong in its ultimate conclusion. The State Supreme Court may have included such words in its opinion for a variety of reasons. And the Ninth Circuit's willingness to take them as an absolute bellwether risks the tolling of the federal limitations period even when it is likely that the state petition was untimely, thus threatening the statutory purpose of encouraging prompt filings in order to protect the federal system from being forced to hear stale claims. In reconsidering the timeliness issue, the Ninth Circuit is left to evaluate any special conditions justifying Saffold's delay in filing in the state court and any other relevant considerations, and to decide whether to certify a question to the State Supreme Court to seek clarification of the state law. Pp. 10-11.

250 F.3d 1262, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 01-301

TOM L. CAREY, WARDEN, PETITIONER *v.* TONY EUGENE SAFFOLD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 17, 2002]

JUSTICE BREYER delivered the opinion of the Court.

The federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a state prisoner seeking a federal habeas corpus remedy to file his federal petition within one year after his state conviction has become "final." 28 U.S.C. § 2244(d)(1)(A). The statute adds, however, that the 1-year period does not include the time during which an application for state collateral review is "pending" in the state courts. § 2244(d)(2).

This case raises three questions related to the statutory word "pending":

(1) Does that word cover the time between a lower state court's decision and the filing of a notice of appeal to a higher state court?

(2) If so, does it apply similarly to California's unique state collateral review system--a system that does not involve a notice of appeal, but rather the filing (within a reasonable time) of a further original state habeas petition in a higher court?

(3) If so, was the petition at issue here (filed in the California Supreme Court 4 1/2 months after the lower state court reached its decision) pending during that period, or was it no longer pending because it failed to comply with state timeliness rules?

We answer the first two questions affirmatively, while remanding the case to the Court of Appeals for its further consideration of the third.

I

In 1990 Tony Saffold, the respondent, was convicted and sentenced in California state court for murder, assault with a firearm, and robbery. His conviction became final on direct review in April 1992. Because Saffold's conviction became final before AEDPA took effect, the federal limitations period began running on AEDPA's effective date, April 24, 1996, giving Saffold one year from that date (in the absence of tolling) to file a federal habeas petition.

A week before the federal deadline, Saffold filed a *state* habeas petition in the state trial court. The state trial court denied the petition. Five days later Saffold filed a further petition in the State Court of Appeal. That court denied his petition. And 4 1/2 months later Saffold filed a further petition in the California Supreme Court. That court also denied Saffold's petition, stating in a single sentence that it did so "on the merits and for lack of diligence." App. G to Pet. for Cert. 1.

Approximately one week later, in early June 1998, Saffold filed a petition for habeas corpus in the Federal District Court. The District Court noted that AEDPA required Saffold to have filed his petition by April 24, 1997. It recognized that the statute gave Saffold extra time by tolling its limitations period while Saffold's application for state collateral review was "pending" in the state courts. But the District Court decided

that Saffold's petition was "pending" only while the state courts were actively considering it, and that period did not include the intervals between the time a lower state court had denied Saffold's petition and the time he had filed a further petition in a higher state court. In Saffold's case those intervals amounted to five days (between the trial court and intermediate court) plus 4 1/2 months (between the intermediate court and Supreme Court), and those intervals made a critical difference. Without counting the intervals as part of the time Saffold's application for state collateral review was "pending," the tolling period was not long enough to make Saffold's federal habeas petition timely. Hence the District Court dismissed the petition.

The Ninth Circuit reversed. It included in the "pending" period, and hence in the tolling period, the intervals between what was, in effect, consideration of a petition by a lower state court and further consideration by a higher state court — at least assuming a petitioner's request for that further higher court consideration was timely. *Saffold v. Newland*, 250 F.3d 1262, 1266 (2001). It added that Saffold's petition to the California Supreme Court was timely despite the 4 1/2 months that had elapsed since the California Court of Appeal decision. That is because the California Supreme Court had denied Saffold's petition, not only because of "lack of diligence" but also "on the merits," a circumstance that showed the California Supreme Court had "applied its untimeliness bar only after considering to some degree the underlying federal constitutional questions raised." *Id.*, at 1267.

We granted certiorari. We now vacate the judgment and remand the case.

II

In most States, relevant state law sets forth some version of the following collateral review procedures. First, the prisoner

files a petition in a state court of first instance, typically a trial court. Second, a petitioner seeking to appeal from the trial court's judgment must file a notice of appeal within, say, 30 or 45 days after entry of the trial court's judgment. See, *e.g.*, Ala. Rule App. Proc. 4 (2001); Colo.App. Rule 4(b)(1) (2001); Ky. Rule Crim. Proc. 12.04(3) (2002). Third, a petitioner seeking further review of an appellate court's judgment must file a further notice of appeal to the state supreme court (or seek that court's discretionary review) within a short period of time, say, 20 or 30 days, after entry of the court of appeals judgment. See, *e.g.*, Ala. Rule App. Proc. 5 (2001); Colo.Rev.Stat. § 13-4-108 (2001); Conn. Rule App. Proc. 80-1 (2002); Ky. Rule Civ. Proc. 76.20(2)(b) (2002). California argues here for a "uniform national rule" to the effect that an application for state collateral review is not "pending" in the state courts during the interval between a lower court's entry of judgment and the timely filing of a notice of appeal (or petition for review) in the next court. Brief for Petitioner 36. Its rationale is that, during this period of time, the petition is not under court consideration.

California's reading of the word "pending," however, is not consistent with that word's ordinary meaning. The dictionary defines "pending" (when used as an adjective) as "in continuance" or "not yet decided." Webster's Third New International Dictionary 1669 (1993). It similarly defines the term (when used as a preposition) as "through the period of continuance . . . of," "until the . . . completion of." *Id.* That definition, applied in the present context, means that an application is pending as long as the ordinary state collateral review process is "in continuance" — *i.e.*, "until the completion of" that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains "pending."

California's reading would also produce a serious statutory anomaly. A federal habeas petitioner must exhaust

state remedies before he can obtain federal habeas relief. The statute makes clear that a federal petitioner has not exhausted those remedies as long as he maintains "the right under the law of the State to raise" in that State, "by any available procedure, the question presented." 28 U.S.C. § 2254(c). We have interpreted this latter provision to require the federal habeas petitioner to "invok[e] one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). The exhaustion requirement serves AEDPA's goal of promoting "comity, finality, and federalism," *Williams v. Taylor*, 529 U.S. 362, 436 (2000), by giving state courts "the first opportunity to review [the] claim," and to "correct" any "constitutional violation in the first instance." *Boerckel*, *supra*, at 844-845. And AEDPA's limitations period — with its accompanying tolling provision — ensures the achievement of this goal because it "promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 178 (2001). California's interpretation violates these principles by encouraging state prisoners to file federal habeas petitions *before* the State completes a full round of collateral review. This would lead to great uncertainty in the federal courts, requiring them to contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the 1-year statute of limitations).

It is therefore not surprising that no circuit court has interpreted the word "pending" in the manner proposed by California. Every Court of Appeals to consider the argument has rejected it. *Melancon v. Kaylo*, 259 F.3d 401, 406 (CA5 2001); *Payton v. Brigano*, 256 F.3d 405, 408 (CA6 2001); *Hizbullahankhamon v. Walker*, 255 F.3d 65, 72 (CA2 2001); *Nyland v. Moore*, 216 F.3d 1264, 1267 (CA11 2000); *Swartz v. Meyers*, 204 F.3d 417, 421-422 (CA3 2000); *Taylor v. Lee*, 186

F.3d 557, 560-561 (CA4 1999); *Nino v. Galaza*, 183 F.3d 1003, 1005 (CA9 1999); *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (CA10 1999). Like these courts, we answer the first question in the affirmative.

III

Having answered the necessarily predicate question of how the tolling provision ordinarily treats applications for state collateral review in typical "appeal" States, we turn to the question whether this rule applies in California. California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new "original" habeas petition. And it determines the timeliness of each filing according to a "reasonableness" standard. These differences, it is argued, require treating California differently from "appeal" States, in particular by not counting a petition as "pending" during the interval between a lower court's determination and filing of another petition in a higher court. See, *e.g.*, Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 5-18.

California's "original writ" system, however, is not as special in practice as its terminology might suggest. As interpreted by the courts, California's habeas rules lead a prisoner ordinarily to file a petition in a lower court first. *In re Ramirez*, 89 Cal.App.4th 1312, 1316, 108 Cal.Rptr.2d 229, 232 (2001) (appellate court "has discretion to refuse to issue the writ . . . on the ground that application has not [first] been made . . . in a lower court"); *Harris v. Superior Court of Cal.*, 500 F.2d 1124, 1126 (CA9 1974) (same); 6 B. Witkin & N. Epstein, California Criminal Law § 20, p. 540 (3d ed.2000) (describing general policy that reviewing court will require application to have been made first in lower court). And a prisoner who files

a subsequent and similar petition in another lower court (say, another trial court) will likely find consideration of that petition barred as successive. See, *e.g.*, *In re Clark*, 5 Cal.4th 750, 767-771, 855 P. 2d 729, 740-744 (1993). At the same time, a prisoner who files that same petition in a higher, reviewing court will find that he can obtain the basic appellate review that he seeks, even though it is dubbed an "original" petition. See *In re Resendiz*, 25 Cal.4th 230, 250, 19 P. 3d 1171, 1184 (2001) (reviewing court grants substantial deference to lower court's factual findings). Thus, typically a prisoner will seek habeas review in a lower court and later seek appellate review in a higher court — just as occurred in this case.

The upshot is that California's collateral review process functions very much like that of other States, but for the fact that its timeliness rule is indeterminate. Other States (with the exception of North Carolina, see *Allen v. Mitchell*, 276 F.3d 183, 186 (CA4 2001)), specify precise time limits, such as 30 or 45 days, within which an appeal must be taken, while California applies a general "reasonableness" standard. Still, we do not see how that feature of California law could make a critical difference. As mentioned, AEDPA's tolling rule is designed to protect the principles of "comity, finality, and federalism," by promoting "the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Duncan*, *supra*, at 178 (internal quotation marks omitted). It modifies the 1-year filing rule (a rule that prevents prisoners from delaying their federal filing) in order to give States the opportunity to complete one full round of review, free of federal interference. Inclusion of California's "reasonableness" periods carries out that purpose in the same way, and to the same degree, as does inclusion of the more specific appellate filing periods prevalent in other States. And exclusion of those periods in California would undermine AEDPA's statutory goals just as it would in those States. See Part II, *supra*.

The fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application (*i.e.*, a filing in a higher court) comes too late. But it is the State's interests that the tolling provision seeks to protect, and the State, through its Supreme Court decisions or legislation, can explicate timing requirements more precisely should that prove necessary.

Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears. See *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946) (looking to function rather than "designation" that state law gives a state-court judgment for purposes of determining federal jurisdiction); *Department of Banking of Neb. v. Pink*, 317 U.S. 264, 268 (1942) (*per curiam*) (same). We find that California's system functions in ways sufficiently like other state systems of collateral review to bring intervals between a lower court decision and a filing of a new petition in a higher court within the scope of the statutory word "pending."

The dissent contends that this application of the federal tolling provision to California's "original writ" system "will disrupt the sound operation of the federal limitations period in at least 36 States." *Post*, at 1 (opinion of KENNEDY, J.). This is so, the dissent believes, because the prisoner is given two choices when his petition has been denied by the intermediate court: He can file a "petition for hearing" in the supreme court within 10 days, or he can file a "new petition" in the supreme court. *In re Reed*, 33 Cal.3d 914, 918, and n.2, 663 P. 2d 216, 217, and n.2 (1983). Why is California different, the dissent asks, from "appeal" States that *also* give their supreme courts the power to entertain original habeas petitions? Won't our interpretation of the federal tolling rule, as it applies to California, apply equally to those other States, meaning that

even after the statutory time to *appeal* to the supreme court has expired, the federal limitations period may still be tolled because a prisoner might, at any time, file an original petition?

The answer to this question is "no." In "appeal" systems, the original writ plays a different role. As the Supreme Court of Idaho (one of the States cited by the dissent) explains:

> "The Supreme Court, having jurisdiction to *review on appeal* decisions of the district courts in habeas corpus proceedings . . . will not exercise its power . . . to grant an *original* writ of habeas corpus, except in *extraordinary cases.*" *In re Barlow*, 48 Idaho 309, 282 P. 380 (1929).

See also, *e.g.*, *Commonwealth v. Salzinger*, 406 Pa. 268, 269, 177 A.2d 619, 620 (1962) ("extraordinary circumstances" required for exercise of original jurisdiction); *La Belle v. Hancock*, 99 N.H. 254, 255, 108 A.2d 545 (1954) (*per curiam*) ("original authority" to grant habeas relief "not ordinarily exercised"); *Ex parte Lambert*, 37 Tex.Crim. 435, 436, 36 S.W. 81, 82 (1896) ("[E]xcept in extraordinary cases, we will not entertain jurisdiction as a court to grant original writs of habeas corpus").

California, in contrast, has engrained original writs — both at the appellate level and in the supreme court — into its normal collateral review process. As we have explained, and as the dissent recognizes, the only avenue for a prisoner to challenge the denial of his application in the superior court is to file a "new petition" in the appellate court. And to challenge an appellate court denial, "*[f]urther review* [of a habeas application] may be sought in [the supreme] court *either* by a new petition for habeas corpus or, preferably, by a petition for hearing." *In re Reed*, *supra*, at 918, n.2, 663 P. 2d, at 216, n.2

(emphasis added). Unlike States such as, say, Idaho, see *In re Barlow*, *supra*, the original writ in California is not "extraordinary" — it is *interchangeable* with the petition for hearing, with neither option bringing adverse consequences to the petitioner. Consequently, we treat California both as *similar* to other States (in that its "original writ" system functions like the "appeal" systems of those other States), and *differently* from other States (in that the rule we apply to original writs in California does not apply to original writs in other States, precisely because original writs in California function like appeals). And of course, as we have said, California remains free, through legislative or judicial action, to adjust its "original writ" system accordingly.

IV

It remains to ask whether Saffold delayed "unreasonably" in seeking California Supreme Court review. If so, his application would no longer have been "pending" during this period. Saffold filed his petition for review in the California Supreme Court 4 1/2 months after the California Court of Appeals issued its decision. The Ninth Circuit held that this filing was nonetheless timely. It based its conclusion primarily upon the fact that the California Supreme Court wrote that it denied the petition "on the merits and for lack of diligence." These first three words, the Ninth Circuit suggested, showed that the California Supreme Court could not have considered the petition too late, for, if so, why would it have considered the merits? 250 F.3d, at 1267.

There are many plausible answers to this question. A court will sometimes address the merits of a claim that it believes was presented in an untimely way: for instance, where the merits present no difficult issue; where the court wants to give a reviewing court alternative grounds for decision; or

where the court wishes to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief. Given the variety of reasons why the California Supreme Court may have included the words "on the merits," those words cannot by themselves indicate that the petition was timely. And the Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. See, *e.g.*, *Welch v. Newland*, 267 F.3d 1013 (CA9 2001) (finding limitations period tolled during 4-year gap). The Ninth Circuit's rule consequently threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims. See *Duncan*, 533 U.S., at 179.

If the California Supreme Court had clearly ruled that Saffold's 4 1/2-month delay was "unreasonable," that would be the end of the matter, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was "entangled" with the merits. 250 F.3d, at 1267. We cannot say in this case, however, that the Ninth Circuit was wrong in its ultimate conclusion. Saffold argues that special circumstances were present here: He was not notified of the Court of Appeal's decision for several months, and he filed within days after receiving notification. And he contends it is more likely that the phrase "lack of diligence" referred to the delay between the date his conviction became final and the date he first sought state post-conviction relief — a matter irrelevant to the question whether his application was "pending" during the 4 1/2-month interval. We leave it to the Court of Appeals to evaluate these and any other relevant considerations in the first instance. We also leave to the Court of Appeals the decision whether it would be appropriate to certify a question to the California Supreme

Court for the purpose of seeking clarification in this area of state law.

* * *

For the foregoing reasons, we answer the first two issues presented in this case in the affirmative, vacate the judgment below, and remand for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 01-301

TOM L. CAREY, WARDEN, PETITIONER *v.* TONY EUGENE SAFFOLD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 17, 2002]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Respondent is a California prisoner who did not file a notice of appeal. The Court, however, begins by considering a question not presented, whether the statute of limitations would have been tolled for a hypothetical prisoner who filed an appeal somewhere else. This is a strong indication that the Court is off in the wrong direction. After holding that tolling applies for its hypothetical appellant, the Court finally gets to California, where no appeal was filed. On the Court's view, California's procedures are "unique," *ante*, at 1, so giving them special treatment under the statute will affect only that one State. It is quite wrong about this. In fact, today's ruling will disrupt the sound operation of the federal limitations period in at least 36 States. This is what happens when the Court departs from the text of a nationwide statute to reach a result in one particular State.

The Court's conclusion that an application is pending before the filing of an original writ in the California Supreme Court rests on three propositions: First, "application" means "petition, appeal from the denial of a petition, and anything else that functions as an appeal." Second, California's procedures are very different from those in other States. Third, a petition for an original writ in the California Supreme Court functions as an appeal. The first is an untenable interpretation of statutory text. The second and third, however, are wrong on both the facts and the law. The remedies available in the California Supreme Court are no different from those available in most other state supreme courts. Like 36 other States, California allows its high court both to reverse the denial of habeas corpus in the lower court and to grant an original petition for habeas outright. In California, as in other States, these procedures differ in more than name. They differ with respect to the question in this case: whether an application was pending in the 4-month period between the denial of respondent's habeas petition in the California Court of Appeal and his filing of a new petition in the California Supreme Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d)(1), provides a 1-year statute of limitations for filing a federal habeas corpus petition, but it tolls the limitations period while a "properly filed application" for collateral review is "pending" in the state courts. The Court now holds that on the day before respondent filed an original petition in the California Supreme Court, his application was "properly filed" and "pending" somewhere. The Court does not say what that application was, nor does it identify the court in which it was filed. This is because nothing had been under consideration or awaiting the result of an appeal for four months, since the California Court of Appeal had denied respondent's previous application.

Instead of identifying a particular pending application, the Court relies upon an expansive definition of the term. The Court begins by defining "pending," offering one definition for when the word is used as an adjective and another for when used as a preposition. See *ante*, at 4. As the statute only uses the word as an adjective (tolling while the application "is pending"), the latter definition is irrelevant and misleading. When used as an adjective, the definition does not help the Court. The Court says "pending" means " 'in continuance' or 'not yet decided.' "*Ante*, at 4 (quoting Webster's Third New International Dictionary 1669 (1993)). The real issue though is not what "pending" means, but when is an "application . . . pending." The Court asserts that "an application is pending as long as the ordinary state collateral review process is 'in continuance' . . ." *Ante*, at 4. That is only true, of course, if "application" means the "ordinary state collateral review process," a proposition that finds no support in Webster's Third. Indeed, it is inconsistent with *Artuz v. Bennett*, 531 U.S. 4 (2000), which recognized that an "application" is a "document" distinct from the legal claims contained within it. *Id.*, at 8, 9. The word, "application," appears in numerous other places in the laws governing federal habeas corpus. *E.g.*, 28 U.S.C. § 2242 ("application for a writ of habeas corpus shall be in writing signed and verified"); § 2243 (a "judge entertaining an application for a writ of habeas corpus"). In each place, it is clear that the statute refers to a specific legal document; in none is the word used as a substitute for the ordinary collateral review process. Without discussing *Artuz* or these many statutory references, the Court gives "application" a new meaning, one that does not even require the existence of any document evidencing the "application," and one that embraces the multiple petitions, appeals, and other filings that constitute the "ordinary state collateral review process." *Ante*, at 4.

The Court explains that the original petition in the California Supreme Court is part of the ordinary collateral review process because it functions as an appeal under California law. California, the Court says, "does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition." *Ante*, at 6. This is an incorrect statement of California law. While California does not permit appeals of the California Superior Court's denial of habeas corpus, it does provide for "appellate review" of the denial of a petition for habeas corpus by the California Court of Appeal. That appeal is not just available; as the Court concedes, *ante*, at 9, the California Supreme Court has said that it is the preferred practice. See *In re Reed*, 33 Cal.3d 914, 918, and n.2, 663 P.2d 216, 217, and n.2 (1983). Section 1506 of the California Penal Code Ann. (West 2000) provides: "[I]n all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court." Respondent had 10 days after the Court of Appeal denied his petition to file a petition for review. Cal. App. Rules of Court 28(b), 50(b) (2002). The Court's analysis is thus premised on a misinterpretation of California law.

Had respondent filed the appeal provided by Cal.Penal Code Ann. § 1506 (West 2000), his application might have remained pending during the 10 days while he prepared his appeal and while the appeal was under consideration by the California Supreme Court. This is because an appeal is not a new application; rather, it is a request that the appellate court order the lower court to grant the original application. Congress used the word "application" in precisely this way for federal petitions for habeas corpus—distinguishing between "appeals," see 28 U.S.C. § 2253, and second or successive "applications," see § 2244. Thus, an application may remain "pending" in the

lower court while the prisoner pursues his appeal, because the lower court may grant the original application at some point in the future.

An application does not remain pending, however, once the court that has denied it loses the power to ever grant it. When the Court of Appeal denied respondent's petition and respondent did not appeal, the petition became final and was no longer pending before that court. See Cal. App. Rule of Court 24 (2002) ("When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court . . ."). Respondent could not ask the Court of Appeal to grant the application, and respondent could not request that the California Supreme Court order the Court of Appeal to grant the application.

Instead respondent filed a new application, a petition for a writ of habeas corpus, invoking the original jurisdiction of the California Supreme Court. See Cal. Const., Art. VI, § 10 (Supp. 2001). Under California law, the original petition began a new proceeding that had no proximate connection to the proceedings in the California Court of Appeal. See *People v. Romero*, 8 Cal.4th 728, 737 833 P.2d 388, 391 (1994). The California Supreme Court had no power to grant the previous petition, and it did not even have the power to vacate the judgment of the lower state court. See *In re Michael E.*, 15 Cal.3d 183, 192-193, n.15, 538 P.2d 231, 237, n.15 (1975). There is no sense in which, before or after the filing of a petition for an original writ, an application remained pending below.

Even if California recognized an original writ as an equivalent procedure to an appeal for purposes of state law, the two procedures would differ with respect to the federal statutory question in this case. When a prisoner files an appeal, the original application remains pending in the lower court, but when a prisoner files an original writ, there is no application pending in any lower court. As it turns out, however, California

law does not regard an appeal and an original writ as equivalents. California recognizes that a prisoner may obtain relief through either procedure, but the California Supreme Court has said an appeal is preferred. *In re Reed*, *supra*, at 918-919, and n.2, 663 P.2d, at 217, n.2. At the same time, a prisoner may use an original writ in circumstances where an appeal is not available. Although California encourages prisoners to exhaust claims in the lower courts, the claims within an original petition need not be the same as those presented earlier. *E.g.*, *In re Black*, 66 Cal.2d 881, 428 P.2d 293 (1967); Cal. App. Rule of Court 56(a)(1) (2002) (directing prisoners to explain why the exhaustion rule should not apply). Indeed, the California Supreme Court may grant relief even if the prisoner has not filed any petition in the lower courts. *E.g.*, *In re Moss*, 175 Cal. App. 3d 913, 922, 221 Cal.Rptr. 645, 649 (1985). As the new petition constitutes a new application in form and function, the California Supreme Court has long recognized what our Court today refuses to see. After the denial of a habeas petition, there is no application "pending" in any court:

> "Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated and was no longer a matter *pending therein*, he could inaugurate a *new proceeding* for relief in another court and can still do so, but is now limited in the making of a new application by statutory provision to a higher court, either the district court of appeal having jurisdiction, or the supreme court." *In re Zany*, 164 Cal. 724, 727, 130 P. 710 (1913).

The petition thus is not pending even under state law: Each habeas petition is a "*new proceeding* for relief," *ibid.*, and is not the same case, let alone the same application. Each time a

California court denies a petition, the application is "no longer a matter *pending*, "*ibid.*, before any court, because it can no longer be granted by that court or any other court in the future.

The Court's contrary conclusion does not depend upon any reasonable construction of a "pending application." It depends entirely upon the proposition that when California says "original writ," it means "appeal," and federal courts must not privilege form over substance. But California provides for an appeal, see Cal. Penal Code Ann. § 1506 (West 2000), and none was taken here. It is impossible to understand why the Court has ignored this provision by which California provides for an appeal, just like every other State.

The Court also has ignored the fact that most other States provide for original writs, just like California. As a consequence, the Court's error is of substantial significance beyond this case; for the California Supreme Court's original jurisdiction to issue writs of habeas corpus is not some quirk of California law. At least 36 other States grant their supreme courts original jurisdiction over petitions for habeas corpus as well as appellate jurisdiction over a habeas determination in the lower courts. See Appendix, *infra*. Congress, of course, understands this distinction, since it has provided both procedures for our own Court. A state prisoner seeking to challenge the validity of his sentence may seek review of a lower court's decision by filing a petition for certiorari, 28 U.S.C. § 1257, or he may file a petition for an original writ of habeas corpus, § 2241. While the prisoner may obtain relief through either procedure, there is a clear distinction between an appeal—which requests that we order the lower court to grant an application pending before it—and a petition for a writ of habeas corpus—which requests that we grant the relief ourselves. Before this case no one thought that distinction to be merely one of form and not substance.

The Court is thus quite mistaken to conclude that its decision concerns only the procedures within California. The Court distinguishes California from other States because California "has engrained original writs—both at the appellate level and in the supreme court—into its normal collateral review process." *Ante*, at 9. This statement is not correct even for California. See *supra*, at 5-6. It may or may not be true for the four other States the Court cites, but even so the federal courts will have to test that point for dozens more. The Court's distinction between "appeal States" and "original writ States" is its own creation with no clear meaning under state law, not to mention a tie to the law Congress has enacted. Having departed from the sensible meaning of application, and the well-understood distinction between an appeal and an original writ, the Court now requires federal courts to define the ordinary collateral review procedures in each State. It may not be clear in how many States original writs will fall on the side of the ordinary, but it is clear that the question will be litigated. In many, if not all, of the States mentioned above, a prisoner like respondent, relying upon today's decision, will be able to extend the federal tolling period, perhaps indefinitely, by filing a petition for an original writ of habeas corpus in a state supreme court many months after his state appeal has been denied. See *Welch v. Newland*, 267 F.3d 1013 (CA9 2001) (tolling the federal limitations for a 4-year gap).

In those jurisdictions the Court will create a strange anomaly. Now an application can be both pending and not pending, taking on what the Seventh Circuit has described as a "Cheshire-cat like quality, both there and not there at the same time." *Fernandez v. Sternes*, 227 F.3d 977, 980 (2000). If, for instance, the Court's hypothetical prisoner declined to file an appeal to the State's highest court, and he went to federal court more than a year later, his petition would be dismissed as time barred. As no application had been on the docket of any court

for a year, and no petition that he had addressed to any state court could ever be granted, no "properly filed application" was "pending" anywhere. Under the Court's view, however, it would be premature to say that the federal statute of limitations had expired. The prisoner could file a new petition invoking the original jurisdiction of the state high court, and if the court denied it on the merits (or without comment), a subsequent federal application could be timely even though the earlier one was too late.

Under today's ruling, the federal court would be required to rule that the state petition, which was not pending before, had retroactively become so, and the prisoner's new federal application was timely. This is not a sensible way of determining when an application is "pending" under the federal tolling provision. Whether an application is pending at any given moment should be susceptible of a yes or no answer. On the Court's theory the answer will often be "impossible to tell," because it depends not on whether an application is under submission in a particular court but upon events that may occur at some later time.

The Court's insistence on treating an original writ as an appeal will create serious confusion in California—and elsewhere—for another reason. Federal courts will have to determine when an original writ is timely under California law because on the Court's holding only timely petitions cause an application to be (retroactively) pending. The problem, however, is that an original writ in California—like original writs elsewhere and unlike appeals in California and most everywhere else—does not have a strict time limit. Under California law the question is not whether a petition is "timely" but whether the prisoner exercised "due diligence" in filing his petition within a reasonable time after he becomes aware of the grounds for relief. *In re Harris*, 5 Cal.4th 813, 828, n.7, 855 P.2d 391, 398, n.7 (1993). This equitable concept is designed

to be flexible, and it allows California courts to correct miscarriages of justice, even those which happened long ago. *E.g.*, *In re Stankewitz*, 40 Cal.3d 391, 396, n.1, 708 P.2d 1260, 1262, n.1 (1985) (hearing the merits despite an 18-month delay); *In re Moss*, 175 Cal. App.3d, at 921, 221 Cal.Rptr., at 648 (hearing the merits despite a 9-month delay). Nothing about AEDPA suggests that Congress wanted to inject this degree of unpredictability into the 1-year statute of limitations, and it is hard to see how federal courts are to approach this state-law inquiry.

While there may be cases, like this one, where the California courts expressly deny a petition for lack of diligence, the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay. Brief for Respondent 40-41, n.27. Under the Court's rule, federal courts will be required to assess, without clear guidance from state law, whether respondent exercised due diligence. This inquiry will create substantial uncertainty, and resulting federal litigation, over whether a prisoner had filed his habeas petition within a reasonable time. The uncertainty may vex prisoners as well, for they cannot know whether the federal statute of limitations is running while they prepare their state petitions.

The Court's disposition in this very case proves that the timing question is often unanswerable. Even though this is the rare case where the California Supreme Court made a specific finding of "lack of diligence," the Court does not hold respondent's petition untimely. Instead, the Court concludes that the lack of diligence finding is ambiguous, because it might refer, not to respondent's 4-month delay in filing his final writ, but to his 5-year delay in pursuing any collateral relief at all. *Ante*, at 11. This ambiguity, however, should not benefit respondent. If the California court held that all of respondent's state habeas petitions were years overdue, then they were not "properly filed" at all, and there would be no tolling of the

federal limitations period. See *Artuz v. Bennett*, 531 U.S., at 8. Our consideration whether respondent's petition was "pending" presupposes that it was "properly filed" in the California courts.

The Court takes a different view, but in delivering the case back to the Court of Appeals, it provides no guidance for resolving the ambiguity. As the question has been thoroughly briefed before our Court, it is difficult to see how the lower court would resolve it, if we could not. The Court says that the Court of Appeals might certify a question to the California Supreme Court, but it gives no indication what that court might ask. Presumably, it is not suggesting that in every case where the California Supreme Court issues a summary denial, the Court of Appeals should certify the factbound question of what it really meant to say.

The Court begins in a hypothetical jurisdiction, and it ends without answering the question presented. Both points are telling. By leaving the text of the federal statute behind and calling California's procedures something they are not, the Court has complicated the disposition of the thousands of petitions filed each year in the federal district courts in California. See U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000, p. 3 (Jan. 2002) (California state prisoners filed 4,017 federal petitions in 2000). The Court also raises these questions in the numerous jurisdictions that permit original writs in addition to appeals. Applying the clear words of the statute to the clear law in California would have been much easier.

I would reverse the judgment of the Court of Appeals.

APPENDIX TO OPINION OF KENNEDY, J.

Ala. Code § 12-2-7(3) (1995); Ariz. Const., Art. VI, § 5(1); Ark. Const., Art. VII, § 4; Colo. Const., Art. VI, § 3; Fla. Rule App. Proc. 9.030(a)(3) (2002); Haw. Rev. Stat. § 660-3 (1993); Idaho Code § 19-4202(1) (Supp. 2001); Ill. Const., Art. VI, § 4(a); Iowa Const., Art. V, § 4; Kan. Const., Art. III, § 3; La. Const., Art. V, § 2; Me. Rev. Stat. Ann., Tit. 14, § 5301 (1980); Md. Cts. & Jud. Proc. Code Ann., § 3-701 (1974-1998); Mich. Comp. Laws Ann. § 600.4304(1) (West 2000); Mo. Const., Art. V, § 4(1); Mont. Const., Art. VII, § 2(1); Neb. Rev. Stat. § 24-204 (1995); Nev. Const., Art. VI, § 4; N. H. Rev. Stat. Ann. § 490:4 (1997); N.M. Const., Art. VI, § 3; N.C. Gen. Stat. § 7A-32(a) (1999); N. D. Cent. Code § 27-02-04 (1991); Ohio Const., Art. IV, § 2; Okla. Const., Art. VII, § 4; Ore. Const., Art. VII, § 2; 42 Pa. Cons. Stat. § 721(1) (1981); R. I. Gen. Laws § 8-1-2 (1997); S. C. Code Ann. § 14-3-310 (1977); S.D. Const., Art. V, § 5 (1978); Tex. Const., Art. V, § 3 (Supp. 2002); Utah Code Ann. § 78-2-2 (2001 Supp.); Vt. Stat. Ann., Tit. 4, § 2(b) (1999); Va. Const., Art. VI, § 1; Wash. Rev. Code § 2.04.010 (1994); W. Va. Code § 51-1-3 (2000); Wyo. Const., Art. V, § 3.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD, PETITIONER-APPELLANT, v. THOMAS L. CAREY, RESPONDENT-APPELLEE.	)))))	No. 99-15541 D.C. No. CV-98-01040-DFL ORDER

On Remand from the United States Supreme Court

Filed July 8, 2002

Before: Betty B. Fletcher, William C. Canby, Jr., and Diarmuid F. O'Scannlain, Circuit Judges

ORDER

The Supreme Court having vacated the opinion of this court, *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001), and remanded, this case is remanded to the district court for further proceedings consistent with *Carey v. Saffold* ("Saffold II"), ____ S. Ct. ____, No. 01-301, 2002 WL 1305725 (U.S. decided June 17, 2002).

Specifically, we remand for an evidentiary hearing so that the district court may determine, in the first instance, whether Saffold filed his original habeas petition in the California Supreme Court "within a reasonable time after [he] knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993). As the Supreme Court observed in Saffold II, "[i]f the California Supreme Court had clearly ruled that Saffold's 4-month delay was 'unreasonable,' that would be the end of the matter." Saffold II, 2002 WL 1305725, at *9. But the California Court did not make such a clear ruling. *Id.* We accordingly ask the district court to determine whether Saffold's petition met the California standard set forth in *Harris*.

The panel retains jurisdiction over the case in the event of any further appeals.

REMANDED.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD,	)	No. 99-15541
PETITIONER-APPELLANT,	)	D.C. No.
v.	)	CV-98-01040-DFL
THOMAS L. CAREY,	)	ORDER
RESPONDENT-APPELLEE.	)	

Filed July 26, 2002

Before: Betty B. Fletcher, William C. Canby, Jr., and Diarmuid F. O'Scannlain, Circuit Judges

ORDER

Appellant's motion for enlargement of time and recall of the mandate is GRANTED IN PART. The mandate of this court that issued on July 9, 2002, is recalled. The order filed by this court on July 8, 2002, is withdrawn and the court sua sponte grants rehearing.

The parties are instructed to file simultaneous briefs addressing the following question: What is the proper disposition to be ordered by this court on remand from the Supreme Court of the United States, in light of the Supreme

Court's opinion, *Carey v. Saffold*, 122 S. Ct. 2134 (2002)?

The briefs are not to exceed twenty-five (25) double-spaced pages in length, and are to be filed on or before thirty (30) days from the date of filing of this order.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD, Petitioner - Appellant,	)	No. 99-15541
	)	D.C. No. CV-98-01040-DFL
	)	Eastern District of California,
v.	)	Sacramento
	)	
THOMAS L. CAREY,	)	ORDER
	)	
Respondent - Appellee.	)	

Before: O'SCANNLAIN, Circuit Judge

The State of California's motion for a stay of the mandate for 90 days to permit the filing of a petition for certiorari to the United States Supreme Court is GRANTED.

If within that time a petition for certiorari is filed, then this stay shall remain in effect until final disposition by the Supreme Court.

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 15, 2001

Mr. Stanley Arthur Cross
1300 I Street
P. O. Box 944255
Sacramento, CA 94244-2550

Re: Anthony Newland
v. Tony Eugene Saffold
No. 01-301

Dear Mr. Cross:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted.

Sincerely,

William K. Suter, Clerk

APPENDIX G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD, Petitioner-Appellant,	)	No. 99-15541
	)	D.C. No.
v.	)	CV-98-01040-DFL
ANTHONY NEWLAND Resondent-Appellee.	)	**ORDER AMENDING OPINION AND DISSENT**

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
February 14, 2000--San Francisco, California

Filed July 17, 2000
Amended May 23, 2001

Before: Betty B. Fletcher, William C. Canby, Jr., and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Canby;
Dissent by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness at least partially addresses the merits, time should be tolled for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations.

Tony Saffold was found guilty in California state court of murder, assault with a firearm, and robbery. His conviction became final on April 20, 1992.

AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled.

AEDPA's tolling provision states that the time during which a properly filed application for State post-conviction or other collateral review is pending shall not be counted toward any period of limitation.

Saffold filed his state habeas application in state superior court by delivering the petition to prison authorities on April 17, 1997 – six days before the AEDPA one-year limitation would have expired.

The court denied Saffold's state habeas petition on June 9, 1997. On June 14, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26. Saffold then waited four and one-half months before he filed an original habeas petition in the California Supreme Court, on November 13. The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court, ruling that the AEDPA limitation was tolled only while each state court had the petition under consideration, excluded the four days from the superior court's denial of Saffold's petition to his petition to the state court of appeal by delivery to prison authorities, and the four and one-half months between the denial by the court of appeal and Saffold's petition to the California Supreme Court. By this calculation, Saffold's federal petition was filed nearly five months over the one-year limitation.

Saffold appealed.

[1] The district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, the Ninth Circuit decided in another case how the tolling period for exhaustion of state remedies is to be determined. The Ninth Circuit held that the AEDPA statute of limitations is tolled for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Applying these principles to California's post-conviction procedure, the Ninth Circuit held that the statute of limitations is tolled from the time the first state habeas petition is filed until the California

Supreme Court rejects the petitioner's final collateral challenge.

[2] The California Supreme Court addressed the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. Tolling AEDPA's statue of limitations until the state has fully completed its review reinforces comity and respect between judicial systems.

[3] Even if giving separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied for lack of diligence, time should have remained tolled because the dismissal for untimeliness at least partially addressed the merits. [4] The California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997.

[5] Habeas corpus petitions filed under AEDPA are deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. [6] On remand, the district court would have to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time.

Judge O'Scannlain dissented, writing that the clock should have continued to run in the periods of Saffold's excessive delay between the three habeas petitions.

COUNSEL

Mary Katherine McComb, Davis, California, for the

petitioner-appellant.

Stan Cross, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

ORDER

The majority opinion of this court and Judge O'Scannlain's dissent therefrom, filed on July 17, 2000, slip op. at 8271, reported at 224 F.3d 1087, are hereby amended as follows:

Majority opinion: Insert new footnote 6, to be indicated at the end of the first sentence of the last paragraph on slip op. at 8278 (ending "'Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence.'"). The new footnote shall state:

> The dissent quotes selectively from these words, *infra*. The fact remains, however, that the California Supreme Court denied Saffold's petition both "*on the merits* and for lack of diligence."

Majority opinion: Insert new footnote 8, to be indicated at the end of the first sentence of the first full paragraph on slip op. at 8280 (ending " . . . June 17, 1997"). The new footnote shall state:

> The dissenting opinion, in its footnote 1, refers to the rule adopted in *Artuz v. Bennett*, 199 F.3d 116 (2d Cir. 1999), *aff'd*, 121 S. Ct. 361 (2000), that "a state-court petition is 'pending' from the time it is first filed until finally disposed of and

further appellate review is unavailable under the particular state's procedures." *Id.* at 120. We have no quarrel with this formulation, but disagree with the dissent that review was "unavailable" to Saffold at the time he filed his original habeas petition in the California Supreme Court. The California Supreme Court, in denying that petition, ruled on its merits. In light of that fact, it is impossible for us to conclude that review was "unavailable" in that court. Moreover, the alternative ruling denying the petition for lack of diligence was "'a condition for obtaining relief,'" necessarily ruled upon by the court, not a "'condition to filing.'" *Dictado v. Ducharme*, _____ F.3d _____, _____, 2001 WL 203252 at *3 (9th Cir. Mar. 28, 2001) (quoting *Artuz v. Bennett*, 121 S. Ct. 361, 365 (2000)). Such procedural bars to the obtaining of relief do not prevent a petition from being "properly filed," *see id.*, and review from therefore being"available" even if unsuccessful.

The remaining footnotes in the majority opinion shall be renumbered accordingly.

Dissenting opinion: The dissenting opinion is amended by deleting the previous dissenting opinion and substituting in full the attached amended dissenting opinion.

With these amendments, Judges B. Fletcher and Canby have voted to deny the petition for panel rehearing, and have recommended denial of en banc rehearing. Judge O'Scannlain has voted to grant panel rehearing and en banc rehearing.

The petition for rehearing en banc and the above amendments have been circulated to the full court. An active judge requested a vote on the petition for rehearing en banc. A vote was taken and the petition failed to receive the affirmative vote of a majority of the active judges of the court. The petition for panel rehearing and for en banc rehearing is DENIED.

OPINION

CANBY, Circuit Judge:

Tony Eugene Saffold is a state prisoner appealing the district court's dismissal of his federal petition for habeas corpus. The district court concluded that Saffold had failed to satisfy the one-year statute of limitations for a state prisoner filing a federal habeas petition. *See* 28 U.S.C. § 2244(d)(1). Whether or not Saffold's petition is barred by the statute of limitations turns in part on a calculation of the period during which the federal statute was tolled while Saffold's petitions for state habeas relief were "pending" in the California courts. *See* 28 U.S.C. § 2244(d)(2). After the district court issued its order, we decided in another case how the tolling period for exhaustion of state remedies is to be determined. *See Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). We now apply *Nino* and conclude that the district court erred by failing to toll the federal statute of limitations for the entire period during which Saffold pursued state habeas relief.

We also conclude that the "mailbox" rule for pro se prisoners applies to Saffold's petitions to the California court and the federal court for purposes of calculating tolling time

under AEDPA. Whether and when Saffold delivered his petitions to prison authorities is unresolved. We therefore reverse the judgment of the district court and remand for further proceedings.

THE STATUTE OF LIMITATIONS

In 1990, Saffold was found guilty in California state court of murder, assault with a firearm, and two counts of robbery. He appealed, and his conviction became final on direct review on April 20, 1992.

Effective April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).[1]

AEDPA's tolling provision states that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2).

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1. We concluded that AEDPA's statute of limitations could not commence running before the effective date of AEDPA, lest prisoners find themselves to be already barred by a limitation on the date it was enacted. *See Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1286-87 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1377 (1999).

Saffold contends that he got in under the wire by filing his state habeas application in the Superior Court of San Joaquin County by delivering the petition to prison authorities on April 17, 1997--just six days before the AEDPA one-year limitation would have expired. The district court accepted that contention for purposes of decision and, in order to review the district court's ruling, we accept it as well.

The issue for our decision is how much of the time after April 17, 1997, was tolled for purposes of AEDPA.[2] We conclude that Saffold had a state collateral proceeding"pending" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), during the entire period from the time he filed his state petition in the trial court until the California Supreme Court denied his habeas petition.

The Superior Court denied Saffold's state habeas petition on June 9, 1997. Five days thereafter, on June 14, 1997, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26, 1997. Saffold then waited four and one-half months before filing an original habeas petition in the California Supreme Court, on November 13, 1997.[3] The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court ruled that the AEDPA limitation was tolled only while each state court had the petition under

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2. We review de novo the district court's dismissal of Saffold's petition on the ground that he has failed to satisfy the statute of limitations. *Miles*, 187 F.3d at 1105.

3. Saffold contends that he did not receive notice of the denial by the Court of Appeal until November 10, 1997.

consideration. Thus, it excluded the gap of four days from the Superior Court's denial of Saffold's petition to his filing of a petition with the state Court of Appeal by delivery to prison authorities. It also excluded the four and one-half months between the denial by the Court of Appeal and Saffold's filing of his petition with the California Supreme Court.[4/] By this calculation, Saffold had run over his one-year limitation by nearly five months when he filed his federal petition.

[1] We know now that the district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, we decided *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). There we held that:

> the AEDPA statute of limitations is tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application."
>
> Applying these principles to California's post-conviction procedure, we hold that the statute of limitations is tolled from the time the first state

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4. There are two methods by which a petitioner may seek review by the California Supreme Court after a habeas petition is denied by the Court of Appeal. The preferred method is by a petition for review, but the petitioner is also free to file instead an original petition in the California Supreme Court. *See Nino*, 183 F.3d at 1006 n.3. Saffold filed an original petition. He therefore was not governed by California's Rule of Court 28(b), upon which the dissent relies, that requires a petition for review to be filed within ten days after the Court of Appeal's decision became final.

> habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

Id. at 1006 (footnote and citation omitted) (emphasis added). It seems clear, therefore, that time should have continued to be tolled during the brief gap of a few days between the Superior Court's denial of Saffold's habeas petition and his filing of a petition in the Court of Appeal. It is less clear under *Nino*, however, whether limitations should be tolled during the four and one-half months after the Court of Appeal denied relief and before Saffold petitioned the California Supreme Court. Section 2244(d)(2) tolls the AEDPA limitation while a "properly filed" application for habeas is pending in state court. 28 U.S.C. § 2244(d)(2). *Nino* stated, as we have emphasized above, that time was tolled while a petitioner was attempting to exhaust state collateral remedies "'through proper use of state court procedures.'" *Nino*, 183 F.3d at 1006. We then added a footnote to Nino, stating:

> Because it is not at issue in this case, we express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims.

Id. at 1006 n.4.[5/]

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5. We note that the Supreme Court has granted certiorari in a case that may address this issue left open in *Nino*. *See Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999), *cert. granted*, No. 99-1238, 2000 WL 122154 (U.S. Apr. 17, 2000).

[2] The California Supreme Court's order denying Saffold relief stated, in its entirety: "Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence."[6] The State contends that this order raises the question that *Nino* left open, but we conclude that the order does not. First and most important, the California Supreme Court did address the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. As we observed in *Nino*, "[t]olling AEDPA's statute of limitations until the state has fully completed its review reinforces comity and respect between our respective judicial systems." *Id.* at 1007. We therefore decline to adopt a rule that would require Saffold to have filed his federal petition before the California Supreme Court ruled on the merits of his claim.

[3] Even if we give separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied "for lack of diligence," we conclude that time should remain tolled because the dismissal for untimeliness at least partially addressed the merits. The order wholly fails to specify, either by additional explanation or citation to authority, whether the delay to which it refers is the four and one-half months from the decision of the Court of Appeal to the filing of Saffold's petition in the California Supreme Court, or the five years from the finality of Saffold's conviction to his first habeas petition.[7] But, in either event, at

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6. The dissent quotes selectively from these words, *infra*. The fact remains, however, that the California Supreme Court denied Saffold's petition both "*on the merits* and for lack of diligence."

7. We note that at the time Saffold's conviction became final, the California Supreme Court's standards for timeliness for filing petitions for habeas corpus petitions were not consistently applied. *See Morales v.*

the time when it denied Saffold's petition partly for "lack of diligence," the California Supreme Court applied its untimeliness bar only after considering to some degree the underlying federal constitutional questions raised. *See La Crosse v. Kernan*, No. 97-55085, 2000 WL 432414, at *3-4 (9th Cir. Apr. 24, 2000). Accordingly, such an untimeliness ruling did not constitute an independent state ground of decision. *See id.* at *4. We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation. The untimeliness ruling involves consideration of the federal constitutional claims. As we have already stated, we are reluctant to require the filing of a federal petition before the California Supreme Court has finished its consideration of the merits of the claims. That reluctance continues whether the California Supreme Court is considering the merits directly, or derivatively in the course of determining whether an untimeliness bar should apply.

[4] We conclude, therefore, that the California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997.[8/] Pursuant to *Nino*, Saffold

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Calderon, 85 F.3d 1387, 1390-93 (9th Cir. 1996).

8. The dissenting opinion, in its footnote 1, refers to the rule adopted in *Artuz v. Bennett*, 199 F.3d 116 (2d Cir. 1999), *aff'd*, 121 S. Ct. 361 (2000), that "a state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Id.* at 120. We have no quarrel with this formulation, but disagree with the dissent that review was "unavailable" to Saffold at the time he filed his original habeas petition in the California Supreme Court. The California Supreme Court, in denying that petition, ruled on its merits. In light of that fact, it is impossible for us to conclude that review was "unavailable" in that court. Moreover, the alternative ruling

is entitled to exclude from the calculation of the one-year limitation the entire period from the filing of his first state habeas petition in Superior Court until the denial of his habeas petition by the California Supreme Court on May 27, 1998.[9]

THE "MAILBOX" RULE

[5] We reverse, therefore, the judgment of the district court that failed to credit Saffold with this entire time of tolling. We cannot direct the district court to entertain Saffold's petition, however, because there remain other matters in dispute concerning its timeliness. In *Houston v. Lack*, 487 U.S. 266, 276 (1988), the Supreme Court held that a notice of appeal by a pro se prisoner is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. We have said that the same rule would appear to apply to habeas corpus petitions filed under AEDPA. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999) (canvassing cases of other circuits so holding). We now hold that it does, and apply the *Houston* "mailbox" rule not only to the filing of Saffold's federal petition but also, for purposes of calculating the AEDPA limitation period, to the filing of Saffold's petition to state court that began the period of tolling. At both times, the conditions

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denying the petition for lack of diligence was "'a condition for obtaining relief,'" necessarily ruled upon by the court, not a "'condition to filing.'" *Dictado v. Ducharme*, ____ F.3d ____, ____, 2001 WL 203252 at *3 (9th Cir. Mar. 28, 2001) (quoting *Artuz v. Bennett*, 121 S. Ct. 361, 365 (2000)). Such procedural bars to the obtaining of relief do not prevent a petition from being "properly filed," *see id.*, and review from therefore being "available" even if unsuccessful.

9. Our conclusion that Saffold is entitled to tolling for this entire period makes it unnecessary for us to address his argument that he is entitled to equitable tolling because of the delay in notifying him of the decision of the California Court of Appeal.

that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court. *See Houston v. Lack*, 487 U.S. 270-72.

[6] The district court assumed, as we have, without deciding, that Saffold delivered his first state petition to prison authorities for mailing on April 17, 1997. The State disputes that point and, because the initial petition was not stamped "filed" in Superior Court until May 1, 1997, it will be necessary for the district court to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time. If Saffold delivered the petition to prison authorities on or before April 23, 1997, it will still be crucial to ascertain exactly when he did so, in order to determine the number of days Saffold had remaining in his one-year limitation period. The number of days remaining may turn out to be less than the number of days between the denial of Saffold's habeas petition by the California Supreme Court on May 27, 1998, and the date Saffold filed his petition in federal court. If so, Saffold's petition would be untimely. To determine this latter issue, the district court may have to address Saffold's contention that he delivered his federal petition, which was filed on June 4, 1998, to prison officials on June 2, 1998. We leave these matters to the district court on remand.

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, dissenting:

Because I disagree with the majority's interpretation of *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), I must respectfully dissent from its application of the federal statute of limitations to state habeas relief and the court's judgment that the district court erred in denying the federal petition.

I

Even if we assume that the majority's newly announced adoption of the "mailbox" rule is appropriate, many additional difficulties persist in its interpretation of *Nino*. Saffold contends, and the majority agrees, that the statute of limitations should be deemed tolled for the entire process of state collateral challenge. I cannot agree. In a case involving such dilatory behavior as this, the tripartite process cannot be treated as one solid block of tolled time; rather, the clock must continue to run in the periods of excessive delay between the three separate habeas petitions.

In *Nino*, this court held that "the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge." *Id.* at 1006. While at a superficial level, this statement may appear to lend support to the majority's argument that the interstitial periods between Saffold's state petitions are irrelevant, a more careful analysis of that precedent exposes the flaws in the majority's interpretation.

After setting out that general pronouncement, the court in *Nino* was careful to mention that "it express[ed] no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition

as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* at 1006 n.4. When Saffold waited four months from the date that his petition to the California Court of Appeal was denied until the date that he handed his California Supreme Court petition to prison officials, he was not "properly pursuing" his appeal. Indeed, the California Supreme Court's dismissal "for lack of diligence" is just the sort of thing that the panel in *Nino* was exempting when it declined to toll "substantial delay[s] in asserting habeas claims."[1/]

Unlike the petitioner in *Nino*, who pursued his state claims diligently through all three avenues of potential relief, Saffold left a glaring gap between two of his collateral appeals.

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1. My reading of *Nino* is consistent with the approach taken to the 28 U.S.C. § 2244(d)(2) "pending" requirement by the Second Circuit in *Artuz v. Bennett*, 199 F.3d 116 (2d Cir. 1999). In *Bennett*, the Second Circuit held that "a state-court petition is 'pending' from the time it is first filed until finally disposed *of and further appellate review is unavailable under the particular state's procedures." Bennett*, 199 F.3d at 120 (emphasis added), *aff'd on other grounds, Artuz v. Bennett*, 121 S.Ct. 361 (2000). In this case, review by the California Supreme Court of Saffold's petition was unavailable due to, as the California Supreme Court itself said, Saffold's "lack of diligence" in pursuing that review. Thus, Saffold's petition was not "pending" under § 2244(d)(2) while he waited for several months to decide whether to seek California Supreme Court review.

It is utterly irrelevant that, as the majority notes in footnote 8, Saffold's procedural default was with regard to a "condition for obtaining relief" rather than with regard to a "condition to filing." The fact that the procedural bar was not with regard to a "condition to filing" simply means that Saffold's petition was "properly filed" under § 2244(d)(2). *Artuz v. Bennett*, 121 S.Ct. 361, 365 (2000). By contrast, the question before us in this case, unlike the question before either the Supreme Court in *Bennett*, or this court in *Dictado v. Ducharme*, ____ F.3d ____, ____ 2001 WL 293252 (9th Cir. Mar. 28, 2001), is whether Saffold's petition was "pending" under § 2244(d)(2), not whether it was "properly filed."

The language of *Nino* expressly contemplated the possibility that the clock could run during periods in which the petitioner was "not properly pursuing his state post-conviction remedies." 183 F.3d at 1006 n.4. *Nino* exempts from its holding instances in which "the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* Under the California court rule governing the "strongly preferred" method of appeal, *id.* at 1006 n.3, Saffold had ten days in which to file his petition for review to the California Supreme Court after the Court of Appeal's decision became final. Cal. Rules of Court, rule 28(b). He waited several months; and when he did eventually file his petition, it was dismissed "for lack of diligence." Under any method of review, Saffold's delay falls substantially outside the period that Nino tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?

II

The magistrate judge provided specific findings and recommendations on the argument that Saffold should not be

held accountable for the four-month delay because during that time he was not made aware that the California Court of Appeal had denied his claim. There was "no state created impediment" to prevent Saffold from having filed his petitions to the California Supreme Court and to the United States District Court in a timely fashion, regardless of the California Court of Appeal's ruling. Furthermore, neither the prison nor the California Court of Appeal did anything to prevent Saffold from receiving notice of the decision.

There simply is no authority for the proposition that Saffold is entitled to relief for not receiving prompt notice of the denials by the various California state courts. Saffold surely could have inquired about the status of his petition once during those four months. He knew that he could ascertain the status of his petition by contacting the court, as he had done so before,[2/] and by choosing to wait so long, he ran the risk of seeing his one-year period evaporate.

III

Equitable tolling does not apply to Saffold because this court has applied that doctrine "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *See, e.g., Miles* , 187 F.3d at 1107 (quoting *Calderon (Kelly)*, 163 F.3d at 541) (internal quotation marks omitted). The Supreme Court echoed this sentiment, ruling out equitable tolling for "what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Here, the magistrate judge

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2. Previously, Saffold wrote to the San Joaquin County Superior Court to determine the status of his petition even before the court had ruled on it.

properly rejected petitioner's delayed notice argument, finding no authority "for the proposition that a court document is not effective until a prisoner receives notice of it."

IV

The court in *Nino* specifically carved out an exception to the language upon which the majority rests its decision. That exception clearly dictates that Saffold's dilatory petitions fall outside the scope of properly pursued state post-conviction appeals. The district court properly dismissed the petition. I therefore dissent.

APPENDIX H

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD, Petitioner-Appellant,	)	No. 99-15541
	)	D.C. No.
v.	)	CV-98-01040-DFL
	)	
ANTHONY NEWLAND Resondent-Appellee.	)	**OPINION**

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
February 14, 2000--San Francisco, California

Filed July 17, 2000

Before: Betty B. Fletcher, William C. Canby, Jr., and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Canby;
Dissent by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness at least partially addresses the merits, time should be tolled for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations.

Tony Saffold was found guilty in California state court of murder, assault with a firearm, and robbery. His conviction became final on April 20, 1992.

AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled.

AEDPA's tolling provision states that the time during which a properly filed application for State post-conviction or other collateral review is pending shall not be counted toward any period of limitation.

Saffold filed his state habeas application in state superior court by delivering the petition to prison authorities on April 17, 1997 – six days before the AEDPA one-year limitation would

have expired.

The court denied Saffold's state habeas petition on June 9, 1997. On June 14, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26. Saffold then waited four and one-half months before he filed an original habeas petition in the California Supreme Court, on November 13. The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court, ruling that the AEDPA limitation was tolled only while each state court had the petition under consideration, excluded the four days from the superior court's denial of Saffold's petition to his petition to the state court of appeal by delivery to prison authorities, and the four and one-half months between the denial by the court of appeal and Saffold's petition to the California Supreme Court. By this calculation, Saffold's federal petition was filed nearly five months over the one-year limitation.

Saffold appealed.

[1] The district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, the Ninth Circuit decided in another case how the tolling period for exhaustion of state remedies is to be determined. The Ninth Circuit held that the AEDPA statute of limitations is tolled for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Applying these principles to California's post-conviction procedure, the Ninth

Circuit held that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

[2] The California Supreme Court addressed the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. Tolling AEDPA's statue of limitations until the state has fully completed its review reinforces comity and respect between judicial systems.

[3] Even if giving separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied for lack of diligence, time should have remained tolled because the dismissal for untimeliness at least partially addressed the merits. [4] The California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997.

[5] Habeas corpus petitions filed under AEDPA are deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. [6] On remand, the district court would have to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time.

Judge O'Scannlain dissented, writing that the clock should have continued to run in the periods of Saffold's excessive delay between the three habeas petitions.

COUNSEL

Mary Katherine McComb, Davis, California, for the petitioner-appellant.

Stan Cross, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

Tony Eugene Saffold is a state prisoner appealing the district court's dismissal of his federal petition for habeas corpus. The district court concluded that Saffold had failed to satisfy the one-year statute of limitations for a state prisoner filing a federal habeas petition. *See* 28 U.S.C. § 2244(d)(1). Whether or not Saffold's petition is barred by the statute of limitations turns in part on a calculation of the period during which the federal statute was tolled while Saffold's petitions for state habeas relief were "pending" in the California courts. *See* 28 U.S.C. § 2244(d)(2). After the district court issued its order, we decided in another case how the tolling period for exhaustion of state remedies is to be determined. *See Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). We now apply *Nino* and conclude that the district court erred by failing to toll the federal statute of limitations for the entire period during which Saffold pursued state habeas relief.

We also conclude that the "mailbox" rule for pro se prisoners applies to Saffold's petitions to the California court

and the federal court for purposes of calculating tolling time under AEDPA. Whether and when Saffold delivered his petitions to prison authorities is unresolved. We therefore reverse the judgment of the district court and remand for further proceedings.

THE STATUTE OF LIMITATIONS

In 1990, Saffold was found guilty in California state court of murder, assault with a firearm, and two counts of robbery. He appealed, and his conviction became final on direct review on April 20, 1992.

Effective April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).[1]

AEDPA's tolling provision states that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted

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1. We concluded that AEDPA's statute of limitations could not commence running before the effective date of AEDPA, lest prisoners find themselves to be already barred by a limitation on the date it was enacted. *See Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1286-87 (9th Cir. 1997), *overruled on other grounds* by *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1377 (1999).

toward any period of limitation." 28 U.S.C. § 2244(d)(2).

Saffold contends that he got in under the wire by filing his state habeas application in the Superior Court of San Joaquin County by delivering the petition to prison authorities on April 17, 1997--just six days before the AEDPA one-year limitation would have expired. The district court accepted that contention for purposes of decision and, in order to review the district court's ruling, we accept it as well.

The issue for our decision is how much of the time after April 17, 1997, was tolled for purposes of AEDPA.[2] We conclude that Saffold had a state collateral proceeding"pending" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), during the entire period from the time he filed his state petition in the trial court until the California Supreme Court denied his habeas petition.

The Superior Court denied Saffold's state habeas petition on June 9, 1997. Five days thereafter, on June 14, 1997, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26, 1997. Saffold then waited four and one-half months before filing an original habeas petition in the California Supreme Court, on November 13, 1997.[3] The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

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2. We review de novo the district court's dismissal of Saffold's petition on the ground that he has failed to satisfy the statute of limitations. *Miles*, 187 F.3d at 1105.

3. Saffold contends that he did not receive notice of the denial by the Court of Appeal until November 10, 1997.

The district court ruled that the AEDPA limitation was tolled only while each state court had the petition under consideration. Thus, it excluded the gap of four days from the Superior Court's denial of Saffold's petition to his filing of a petition with the state Court of Appeal by delivery to prison authorities. It also excluded the four and one-half months between the denial by the Court of Appeal and Saffold's filing of his petition with the California Supreme Court.[4] By this calculation, Saffold had run over his one-year limitation by nearly five months when he filed his federal petition.

[1] We know now that the district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, we decided *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). There we held that:

> the AEDPA statute of limitations is tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application."

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4. There are two methods by which a petitioner may seek review by the California Supreme Court after a habeas petition is denied by the Court of Appeal. The preferred method is by a petition for review, but the petitioner is also free to file instead an original petition in the California Supreme Court. *See Nino*, 183 F.3d at 1006 n.3. Saffold filed an original petition. He therefore was not governed by California's Rule of Court 28(b), upon which the dissent relies, that requires a petition for review to be filed within ten days after the Court of Appeal's decision became final.

> Applying these principles to California's post-conviction procedure, we hold that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

Id. at 1006 (footnote and citation omitted) (emphasis added). It seems clear, therefore, that time should have continued to be tolled during the brief gap of a few days between the Superior Court's denial of Saffold's habeas petition and his filing of a petition in the Court of Appeal. It is less clear under *Nino*, however, whether limitations should be tolled during the four and one-half months after the Court of Appeal denied relief and before Saffold petitioned the California Supreme Court. Section 2244(d)(2) tolls the AEDPA limitation while a "properly filed" application for habeas is pending in state court. 28 U.S.C. § 2244(d)(2). *Nino* stated, as we have emphasized above, that time was tolled while a petitioner was attempting to exhaust state collateral remedies "'through proper use of state court procedures.'" *Nino*, 183 F.3d at 1006. We then added a footnote to Nino, stating:

> Because it is not at issue in this case, we express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims.

Id. at 1006 n.4.[5/]

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5. We note that the Supreme Court has granted certiorari in a case that may address this issue left open in *Nino*. *See Bennett v. Artuz*, 199 F.3d

[2] The California Supreme Court's order denying Saffold relief stated, in its entirety: "Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence." The State contends that this order raises the question that *Nino* left open, but we conclude that the order does not. First and most important, the California Supreme Court did address the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. As we observed in Nino , "[t]olling AEDPA's statute of limitations until the state has fully completed its review reinforces comity and respect between our respective judicial systems." *Id.* at 1007. We therefore decline to adopt a rule that would require Saffold to have filed his federal petition before the California Supreme Court ruled on the merits of his claim.

[3] Even if we give separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied "for lack of diligence," we conclude that time should remain tolled because the dismissal for untimeliness at least partially addressed the merits. The order wholly fails to specify, either by additional explanation or citation to authority, whether the delay to which it refers is the four and one-half months from the decision of the Court of Appeal to the filing of Saffold's petition in the California Supreme Court, or the five years from the finality of Saffold's conviction to his first habeas petition.[6] But, in either event, at the time when it denied Saffold's petition partly for "lack of

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116 (2d Cir. 1999), *cert. granted*, No. 99-1238, 2000 WL 122154 (U.S. Apr. 17, 2000).

6. We note that at the time Saffold's conviction became final, the California Supreme Court's standards for timeliness for filing petitions for habeas corpus petitions were not consistently applied. *See Morales v. Calderon*, 85 F.3d 1387, 1390-93 (9th Cir. 1996).

diligence," the California Supreme Court applied its untimeliness bar only after considering to some degree the underlying federal constitutional questions raised. *See La Crosse v. Kernan*, No. 97-55085, 2000 WL 432414, at *3-4 (9th Cir. Apr. 24, 2000). Accordingly, such an untimeliness ruling did not constitute an independent state ground of decision. *See id.* at *4. We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation. The untimeliness ruling involves consideration of the federal constitutional claims. As we have already stated, we are reluctant to require the filing of a federal petition before the California Supreme Court has finished its consideration of the merits of the claims. That reluctance continues whether the California Supreme Court is considering the merits directly, or derivatively in the course of determining whether an untimeliness bar should apply.

[4] We conclude, therefore, that the California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997. Pursuant to *Nino*, Saffold is entitled to exclude from the calculation of the one-year limitation the entire period from the filing of his first state habeas petition in Superior Court until the denial of his habeas petition by the California Supreme Court on May 27, 1998.[7]

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7. Our conclusion that Saffold is entitled to tolling for this entire period makes it unnecessary for us to address his argument that he is entitled to equitable tolling because of the delay in notifying him of the decision of the California Court of Appeal.

THE "MAILBOX" RULE

[5] We reverse, therefore, the judgment of the district court that failed to credit Saffold with this entire time of tolling. We cannot direct the district court to entertain Saffold's petition, however, because there remain other matters in dispute concerning its timeliness. In *Houston v. Lack*, 487 U.S. 266, 276 (1988), the Supreme Court held that a notice of appeal by a pro se prisoner is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. We have said that the same rule would appear to apply to habeas corpus petitions filed under AEDPA. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999) (canvassing cases of other circuits so holding). We now hold that it does, and apply the *Houston* "mailbox" rule not only to the filing of Saffold's federal petition but also, for purposes of calculating the AEDPA limitation period, to the filing of Saffold's petition to state court that began the period of tolling. At both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court. *See Houston v. Lack*, 487 U.S. 270-72.

[6] The district court assumed, as we have, without deciding, that Saffold delivered his first state petition to prison authorities for mailing on April 17, 1997. The State disputes that point and, because the initial petition was not stamped "filed" in Superior Court until May 1, 1997, it will be necessary for the district court to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time. If Saffold delivered the petition to prison authorities on or before April 23, 1997, it will still be crucial to ascertain exactly when he did so, in order to determine the

number of days Saffold had remaining in his one-year limitation period. The number of days remaining may turn out to be less than the number of days between the denial of Saffold's habeas petition by the California Supreme Court on May 27, 1998, and the date Saffold filed his petition in federal court. If so, Saffold's petition would be untimely. To determine this latter issue, the district court may have to address Saffold's contention that he delivered his federal petition, which was filed on June 4, 1998, to prison officials on June 2, 1998. We leave these matters to the district court on remand.

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, dissenting:

Because I disagree with the majority's interpretation of *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), I must respectfully dissent from its application of the federal statute of limitations to state habeas relief and the court's judgment that the district court erred in denying the federal petition.

I

Even if we assume that the majority's newly announced adoption of the "mailbox" rule is appropriate, many additional difficulties persist in its interpretation of *Nino*. Saffold contends, and the majority agrees, that the statute of limitations should be deemed tolled for the entire process of state collateral challenge. I cannot agree. In a case involving such dilatory behavior as this, the tripartite process cannot be treated as one solid block of tolled time; rather, the clock must continue to run in the periods of excessive delay between the three separate habeas petitions.

In *Nino*, this court held that "the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge." *Id.* at 1006. While at a superficial level, this statement may appear to lend support to the majority's argument that the interstitial periods between Saffold's state petitions are irrelevant, a more careful analysis of that precedent exposes the flaws in the majority's interpretation.

After setting out that general pronouncement, the court in *Nino* was careful to mention that "it express[ed] no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* at 1006 n.4. When Saffold waited four months from the date that his petition to the California Court of Appeal was denied until the date that he handed his California Supreme Court petition to prison officials, he was not "properly pursuing" his appeal. Indeed, the California Supreme Court's dismissal "for lack of diligence" is just the sort of thing that the panel in *Nino* was exempting when it declined to toll "substantial delay[s] in asserting habeas claims."

Unlike the petitioner in *Nino*, who pursued his state claims diligently through all three avenues of potential relief, Saffold left a glaring gap between two of his collateral appeals. The language of *Nino* expressly contemplated the possibility that the clock could run during periods in which the petitioner was "not properly pursuing his state post-conviction remedies." 183 F.3d at 1006 n.4. *Nino* exempts from its holding instances in which "the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* Under the

California court rule governing the "strongly preferred" method of appeal, id. at 1006 n.3, Saffold had ten days in which to file his petition for review to the California Supreme Court after the Court of Appeal's decision became final. Cal. Rules of Court, rule 28(b). He waited several months; and when he did eventually file his petition, it was dismissed "for lack of diligence." Under any method of review, Saffold's delay falls substantially outside the period that Nino tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?

II

The magistrate judge provided specific findings and recommendations on the argument that Saffold should not be held accountable for the four-month delay because during that time he was not made aware that the California Court of Appeal had denied his claim. There was "no state created impediment" to prevent Saffold from having filed his petitions to the California Supreme Court and to the United States District Court in a timely fashion, regardless of the California Court of Appeal's ruling. Furthermore, neither the prison nor the

California Court of Appeal did anything to prevent Saffold from receiving notice of the decision.

There simply is no authority for the proposition that Saffold is entitled to relief for not receiving prompt notice of the denials by the various California state courts. Saffold surely could have inquired about the status of his petition once during those four months. He knew that he could ascertain the status of his petition by contacting the court, as he had done so before,[1/] and by choosing to wait so long, he ran the risk of seeing his one-year period evaporate.

III

Equitable tolling does not apply to Saffold because this court has applied that doctrine "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *See, e.g., Miles* , 187 F.3d at 1107 (quoting *Calderon (Kelly)*, 163 F.3d at 541) (internal quotation marks omitted). The Supreme Court echoed this sentiment, ruling out equitable tolling for "what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Here, the magistrate judge properly rejected petitioner's delayed notice argument, finding no authority "for the proposition that a court document is not effective until a prisoner receives notice of it."

IV

The court in *Nino* specifically carved out an exception

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1. Previously, Saffold wrote to the San Joaquin County Superior Court to determine the status of his petition even before the court had ruled on it.

to the language upon which the majority rests its decision. That exception clearly dictates that Saffold's dilatory petitions fall outside the scope of properly pursued state post-conviction appeals. The district court properly dismissed the petition. I therefore dissent.

APPENDIX I

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD,	)	No. 99-15541
	)	D.C. No.
Petitioner-Appellant,	)	CV-98-01040-DFL
	)	
v.	)	
	)	
ANTHONY NEWLAND,	)	**ORDER**
	)	
Respondent-Appellee.	)	FILED: June 4, 2001
	)	

CANBY, Circuit Judge

The motion of the respondent-appellee for a stay of mandate is GRANTED. The mandate of this court is stayed for 90 days from May 23, 2001, the date of denial of the respondent's petition for panel and en banc rehearing. If, within that time, a petition for certiorari is filed with the Clerk of the Supreme Court of the United States, then the mandate shall be further stayed until final disposition of the petition by the Supreme Court.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

No. CIV S-98-1040 DFL
JFM P

vs.

ANTHONY NEWLAND,

Respondent.

ORDER

FILED: Feb. 25, 1999

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Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's January 6, 1999 order which granted respondent's August 28, 1998 motion to dismiss. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate which specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253(c)(3).

Petitioner has made a substantial showing of the denial of a constitutional right in the following issues presented in the instant petition: whether petitioner's application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1).

Accordingly, IT IS HEREBY ORDERED that a certificate of appealability is issued in the present action.

DATED: February 24, 1999.

s/ David F. Levi
UNITED STATES DISTRICT JUDGE

APPENDIX K

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner, No. CIV S-98-1040 DFL JFM P

vs.

ANTHONY NEWLAND, **ORDER**

Respondent. FILED: Jan. 6, 1999

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Petitioner, a state prisoner, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On November 3, 1998, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed November 3, 1998, are adopted in full;

2. Respondent's August 28, 1998 motion to dismiss is granted; and

3. This action is dismissed.

DATED: January 5, 1999

s/ David F. Levi
UNITED STATES DISTRICT JUDGE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

vs.

ANTHONY NEWLAND,

Respondent.

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No. CIV S-98-1040 DFL JFM P

FINDINGS & RECOMMENDATIONS

FILED: Nov. 3, 1998

Petitioner, a state prisoner proceeding pro se and in forma pauperis, filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on June 4, 1998. This matter is before the court on respondent's September 21, 1998 motion to dismiss.

Respondent contends that the petition is barred by the statute of limitations and is not exhausted. Petitioner argues that the petition is timely and/or that the statute of limitations period should be equitably tolled. He concedes that his petition contains an unexhausted claim, but requests that the court dismiss that claim and proceed with the remainder of the petition.

I. Statute of Limitations

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted. The AEDPA

amended 28 U.S.C. § 2244(d)(1) so that it now provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2244(d)(2) provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. 28 U.S.C. § 2244(d). The statute of limitations was enacted on April 24, 1996, and the one year time limit began to run on that date against state prisoners whose convictions had become final on or before that date. Calderon v. U.S. Dist. Court for Central Dist. of Cal. (Beeler), 128 F.3d

1283, 1286 (9th Cir. 1997). The Ninth Circuit has held that § 2244(d) is a statute of limitations subject to equitable tolling. Id. at 1285.

II. Analysis

A. Limitations Period

For purposes of the statute of limitations analysis, the relevant chronology of this case is as follows. On April 3, 1990, petitioner was found guilty after a jury trial. On July 6,1990, petitioner filed a notice of appeal. On January 27, 1992, the California Court of Appeal filed an opinion in which it stayed part of petitioner's sentence and affirmed the judgment as modified. On March 4, 1992, petitioner filed a petition for review with the California Supreme Court. On April 15, 1992, the California Supreme Court denied the petition for review. On April 20, 1992, the California Court of Appeal certified that the January 27, 1992 opinion had become final. The statute of limitations began to run on April 24, 1996, the date of enactment of the AEDPA, since petitioner's conviction had become final before that date. Calderon, 128 F. 3d at 1286. Petitioner did not file any documents in the California courts before the statute of limitations expired on April 24, 1997.

On May 1, 1997, petitioner filed a petition for writ of habeas corpus with the San Joaquin County Superior Court. This petition was denied on June 9, 1997. On June 18, 1997, petitioner filed a petition for writ of habeas corpus with the California Court of Appeal. The petition was denied on June 26, 1997. On November 13, 1997, petitioner filed a petition for writ of habeas corpus with the California Supreme Court. The petition was denied on May 27, 1998. On June 4, 1998, petitioner filed the instant application for a writ of habeas corpus.

Because petitioner's May 1, 1997, June 18, 1997, and November 13, 1997 petitions were filed after the statute of limitations had expired, they do not operate to toll the statute. Petitioner argues, however, that the application of the limitations period must be delayed because of state action which prevented him from filing a timely application and because petitioner only recently discovered the factual predicate of one of the claims presented.

B. Mailbox Rule

Petitioner contends that the statute of limitations should be equitably tolled because of the mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk). He has filed two declarations in this court in which he sets forth the dates on which he gave his petitions to prison guards for filing in the California courts and in this court. The dates do not match, but neither set of dates will avoid the statute of limitations. In his declaration under penalty of perjury filed in support of the petition for writ of habeas corpus in this court, petitioner represents that he gave his petition for writ of habeas corpus to prison authorities for filing in the California Superior Court on April 17, 1997, in the California Court of Appeal on June 15, 1997, in the California Supreme Court on November 10, 1997, and in this court on June 2, 1998.

In his opposition to the instant motion, petitioner declares under penalty of perjury that he gave his petition for writ of habeas corpus to prison authorities for filing in the California Court of Appeal on June 14, 1997 and in this court on May 27, 1998. The second set of dates is somewhat suspect since the petition for writ of habeas corpus filed in this court was signed by petitioner on June 2, 1998, six days after he

declared under penalty of perjury he gave it to prison authorities for mailing. Petitioner is advised that the filing of false information with this court may lead to civil and criminal sanctions. In the interest of timely resolution of this motion, however, the court will analyze the problem under both sets of dates.

Assuming *arguendo* the accuracy of the first declaration, the statute of limitations began to run against petitioner on April 24, 1996. Petitioner filed his petition for writ of habeas corpus in the California Superior Court on April 17, 1997, three hundred fifty eight days after the statute began to run. This tolled the statute of limitations. 28 U.S.C. § 2244(d)(2). The petition was denied on June 9, 1997. The statute of limitations began to run again on June 10, 1997. At this time petitioner had seven days left to file his petition. Petitioner filed his petition with the California Court of Appeal on June 14, 1997, or four days later. He then had three days left to file his petition. The statute was tolled until the petition was denied on June 26, 1997. The statute began to run again on June 27, 1997. Petitioner filed his petition with the California Supreme Court on November 10, 1997, more than four months after the statute resumed running. If these dates are accurate the petition was untimely.[1/]

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1. Petitioner contends that the Court of Appeals denied his petition on November 10, 1997, because that is when he allegedly received notice of the denial. Petitioner cites no authority for the proposition that a court document is not effective until a prisoner receives notice of it, and this court declines to so hold. Further, if petitioner wished to ascertain the status of his petition with the Court of Appeal, he could have corresponded with that court, as he did in November.

Even if the Court of Appeals had denied the petition on November 10, 1997, and petitioner had filed his petition with the California Supreme Court on that date, his petition to this court would still be untimely. The petition to the California Supreme Court was denied on May 27, 1998. The statute began to run again on May 28, 1998. Petitioner would then have had

Assuming *arguendo* the accuracy of the second declaration, the statute of limitations also began to run against petitioner on April 24, 1996. Petitioner filed his petition for writ of habeas corpus in the California Superior Court on April 17, 1997, three hundred fifty eight days after the statute began to run. This tolled the statute of limitations. 28 U.S.C.§ 2244(d)(2). The petition was denied on June 9, 1997. The statute of limitations began to run again on June 10, 1997. At this time petitioner had seven days left to file his petition. Petitioner filed his petition with the California Court of Appeal on June 14, 1997, or four days later. He then had three days left to file his petition. The statute was tolled until the petition was denied on June 26, 1997. The statute began to run again on June 27, 1997. Petitioner filed his petition with the California Supreme Court on November 10, 1997, more than four months after the statute resumed running. Using these dates the petition again was untimely.

C. Improper State Action

Petitioner claims that the one year period of limitation should not have begun to run until November 10, 1997, because the state created an impediment to timely filing of his application. See 28 U.S.C. § 2244(d)(1)(B). Petitioner states that although his petition to the California Court of Appeal was denied on June 26, 1997, he was not put on notice of the denial until November 10, 1997, when he wrote to the California Court of Appeal asking for information about the status of his petition. Petitioner surmises that he failed to receive earlier notice of the denial because of "State action by either the Appellate Court's

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three days left to file his petition in this court. Pursuant to the "mailbox rule," petitioner filed the instant application on June 2, 1998, which is five days later, or two days too late.

failure to notify Petitioner that the petition had been denied, or the prison's failure to issue Petitioner his legal mail." (Response at 5.) He contends that the failure to receive notification of the denial constitutes illegal state action preventing the filing of an earlier petition both in the California Supreme Court and in this court. Even assuming that petitioner did not receive notice of the denial of his petition for writ of habeas corpus to the California Court of Appeal until November 10, 1997, this would not make his petition timely. There was no state created impediment to filing his earlier applications to the California courts on April 17, 1997 and June 15, 1997. Accordingly, the statute had already started to run at the time of petitioner's receipt of the decision of the Court of Appeals. As discussed above, even if petitioner was unable to file his subsequent petition until November 10, 1997 because of some improper state action, the petition would still be untimely.

Further, the vague claim made by petitioner that someone must have prevented him from receiving notice of the decision does not constitute "unconstitutional state action." There is no evidence that either the Court of Appeal or prison authorities failed to obey the constitution in this regard. See, eg., Miller v. Marr, 141 F. 3d 976, 978 (10th Cir. 1998), cert. denied ____ S.Ct. ____, 1998 WL 407280 (U.S. Oct. 5, 1998) (not enough to say, without elaboration, that prison library lacked relevant statutes and case law or that the procedure to request specific materials was inadequate) Hullum v. Maloney, 14 F. Supp. 2d 164 (D. Mass.1998) (same). Petitioner's claim lacks merit.

D. Discovery of Factual Predicate of Claims

Petitioner claims that the one year period of limitation should not begin to run until February 1997 because he could not have discovered the factual predicate of one of his claims

prior to that time. See 28 U.S.C. § 2244(d)(1)(D).[2/] If petitioner is correct, then his petition would be timely.

One of petitioner's claims is that his trial counsel was ineffective because he failed to introduce preliminary hearing testimony to the effect that the victim's wife had identified two other men in a photo lineup as the possible perpetrators of her husband's murder. He argues that this evidence was necessary in order to impeach the testimony of the victim's wife.[3/] (Petition at 18 - 19.) Petitioner states that it was not until his family hired a private investigator in February 1997 to poll the jurors at his trial that he discovered that this information might have influenced the verdict of several jurors. He states that, until this time, he was not aware that he could satisfy the "prejudice" prong of this particular claim.

Petitioner's claim must fail. He was aware during his trial that the victim's wife had not been impeached with the preliminary hearing testimony. He was therefore aware of the "factual predicate" of this claim at that time and could have raised it then. Although petitioner states that it was not until he received the juror statements that he was aware that counsel's omission may have actually influenced the jury, this evidence did not establish a factual predicate for his claim but only possible evidence in support thereof. Section 2244(d)(1)(D) runs from the date a petitioner is on notice of the facts which would support a claim, not from the date on which he has in his possession evidence to support his claim. See, e.g., Flanagan v. Johnson, 154 F. 3d 196, 198 (5th Cir. 1998) ("[Petitioner] is

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2. In another part of the opposition, petitioner alleges that the factual predicate of his 26 ineffective assistance of counsel claim was discovered on May 8, 1997. (Opposition at 12.)

3. The victim's wife also identified petitioner as the perpetrator from a photo lineup.

confusing his knowledge of the factual predicate of his claim with the time permitted for gathering evidence in support of that claim. . . Section 2244(d)(1)(D) does not convey a statutory right to an extended delay . . . while a habeas petitioner gathers every possible scrap of evidence that might . . . support his claim"); Youngblood v. Greiner, 1998 WL 720681 (S.D.N.Y. 1998) (receipt of evidence in support of petitioner's claim would not toll the statute where facts underlying the claim were known earlier). The court also notes that petitioner argues in his petition to this court that no showing of prejudice is required as to this claim. (See Petition at 19, 29.)

The court also concludes that petitioner has not made a showing that he exercised due diligence in obtaining the juror information. He states that he had "no way of knowing how to contact the jurors" but that his family was "finally able to hire a private investigator." Other than these excuses as to his inaction, he has made no showing of an effort to learn this information earlier. Finally, the court notes that petitioner has raised numerous other claims in his petition. There is no evidence that those claims were unknown at an earlier date. Petitioner's claim that the statute of limitations did not begin to run until February 1997, is without merit.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's August 28, 1998 motion to dismiss be granted and this case be closed.[4/]

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the

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4. In light of this disposition, the court need not rule on respondent's claim that the petition is not exhausted or on petitioner's request that the court proceed only on the exhausted claims.

court. The document should be captioned "Objections to Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 30, 1998.

s/ John F. Moulds
UNITED STATES MAGISTRATE JUDGE

APPENDIX M

S065746

IN THE SUPREME COURT OF CALIFORNIA

IN RE TONY EUGENE SAFFOLD

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence.

FILED: May 27, 1998

s/ George
Chief Justice